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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1987

JAN MARIE WICKSTROM by H. D. WICKSTROM and JOHN RING, conservators of the person and estate of JAN MARIE WICKSTROM,

Petitioner,

vs.

MAPLEWOOD TOYOTA, INC., a Minnesota corporation, TOYOTA MOTOR DISTRIBUTORS, INC., a California corporation, TOYOTA MOTOR SALES, U.S.A., INC. a California corporation, TOYOTA MOTOR CORPORATION, a Japanese corporation, and LOUIS CHAPMAN,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM ORDER OF THE MINNESOTA SUPREME COURT

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I. QUESTION PRESENTED FOR REVIEW

Whether the National Highway Traffic Safety Act and Administrative Rules promulgated pursuant thereto expressly or impliedly preempt Petitioner's claim that an airbag could have been installed in her vehicle as an alternative safe design.

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IN THE

Supreme Court of the United States

October Term, 1987

NO. ____

JAN MARIE WICKSTROM by H. D. WICKSTROM and JOHN RING, conservators of the person and estate of JAN MARIE WICKSTROM,

Petitioner,

vs.

MAPLEWOOD TOYOTA, INC., a Minnesota corporation, TOYOTA MOTOR DISTRIBUTORS, INC., a California corporation, TOYOTA MOTOR SALES, U.S.A., INC., a California corporation, TOYOTA MOTOR CORPORATION, a Japanese corporation, and LOUIS CHAPMAN,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

II. OPINION BELOW

The Supreme Court of the State of Minnesota filed its Order on February 17, 1988, denying further review of Petitioner's appeal. A copy of that Order is located in the Appendix at A-1.

The Order of February 17, 1988 rejected further review of an opinion of the Minnesota Court of Appeals filed on December 22, 1987. That

opinion has been reported at *Wickstrom v. Maplewood Toyota, et al.*, 416 N.W.2d 838 (Minn.App. 1987), and appears in the Appendix at A-1.

The Minnesota Court of Appeals' opinion of December 22, 1987 affirmed a judgment entered in the Second Judicial District, County of Ramsey, State of Minnesota, entered pursuant to an Order and Memorandum of the Trial Court dated March 12, 1987 and a Corrected Judgment of March 24, 1987. Copies of the Order, Memorandum and Corrected Judgment appear in the Appendix at A-18.

III. GROUNDS UPON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) and Rule 17(1)(b) and (c) of the Rules of the Supreme Court of the United States. This Petition is timely filed within the 90-day period provided in 28 U.S.C. § 2101(c).

The date of the Order of the Supreme Court of Minnesota denying further review of Petitioner's appeal was February 17, 1988.

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The question presented in this Petition for Writ of Certiorari involves the Supremecy Clause of Article VI of the United States Constitution:

> Clause 2. Supreme Law. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes involved are 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(c) of the National Traffic and Motor Vehicle Safety Act of 1966 (hereinafter "Safety Act"):

Section 1392 — Motor Vehicle Safety Standards

(d) *Supremacy of Federal Standards: Allowable higher standards for vehicles used by federal or state governments.* Whenever a Federal Motor Vehicle Safety Standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * *

Section 1397

(c) *Continuation of common law liability.* Compliance with any Federal Motor Vehicle Safety Standard issued under this title does not exempt any person from any liability under common law.

Federal Motor Vehicle Safety Standard 208.4.1.2, found at 49 C.F.R. § 571.208 contains the administrative rules enabled by 15 U.S.C. § 1392(a) is also involved. FMVSS 208.4.1.2 is set out in the Appendix at A-11.

V. STATEMENT OF THE CASE

A. Facts Of The Incident.

On March 31, 1983, Dr. Jan Marie Wickstrom was driving her 1983 Toyota Tercel, wearing her seat belt and shoulder harness, when she

was struck head-on by a fleeing bank robber. She received a catastrophic brain injury as a result of the accident and is unable to return to her career as a physician.

Dr. Wickstrom's claim is that her vehicle was negligently designed and that Respondents could have provided airbags in her vehicle as an alternative safe design.

B. Stages In Proceedings At Which Federal Questions Were Raised.

On or about May 15, 1985, Petitioner commenced this action in the Second Judicial District Court, County of Ramsey, State of Minnesota against Toyota Motor Corporation and the other Toyota Defendants. On or about June 4, 1985, the Toyota Defendents served separate answers in which they alleged that the National Traffic and Motor Vehicle Safety Act, and its implementing regulations, preempted Petitioner's common law claim.

On February 6, 1987, Respondents moved the trial court for an order dismissing Petitioner's claim that airbags could have been provided in her vehicle as an alternative safe design. On March 12, 1987, the trial court granted partial summary judgment on the grounds that Federal law both expressly and impliedly preempted Petitioner's airbag claim.

On June 19, 1987, Petitioner filed a Notice of Appeal to Minnesota's intermediate appellate court, the Minnesota Court of Appeals, from entry of judgment of the trial court's order. The Minnesota Court of Appeals, in a decision of December 22, 1987, affirmed the trial court.

On January 21, 1988, Petitioner filed a Petition for Review of the Decision of the Court of Appeals with the Minnesota Supreme Court. In its Order, filed on February 17, 1988, the Minnesota Supreme Court denied Petitioner's petition for further review.

VI. ARGUMENT FOR GRANTING THIS WRIT

1. Introduction

Had Petitioner been injured in Massachusetts, California, Pennsylvania or a number of other jurisdictions, she would have been able to make

her airbag claim before a jury. Petitioner was unfortunate to have been injured in Minnesota where, as in Montana, Arizona, Maryland and other jurisdictions courts have ruled that an "airbag claim" is preempted by the National Highway Traffic Safety Act and the regulations enabled by that Act. In some jurisdictions, such as Texas, Maryland, Florida and Georgia there is conflicting authority. In view of this inconsistent application of Federal law affecting a fundamental state-created right, this is an important question which has not been, but should be, settled by this Court to assure justice and fairness to all tort victims regardless of the jurisdiction of their injury.

The decision of the Minnesota Court of Appeals is inconsistent with preemption principles established by this Court and therefore the Writ should be granted. Additionally, the Minnesota Court of Appeals ignored the indicia of Congressional intent in enacting the National Highway Traffic Safety Act. Determining Congressional intent should have been the Minnesota Court of Appeals' sole task.

2. The Opinion Of The Minnesota Court of Appeals Conflicts With Federal And State Appellate Courts Which Have Addressed The Preemptive Effect Of The Safety Act.

Virtually all Federal and State appellate courts which have discussed the preemptive effect of the Safety Act have rejected preemption. As the Eighth Circuit stated in the first such case, *Larsen v. General Motors Corporation*, 391 F.2d 495 (8th Cir. 1968):

> Section 108(c) of the Act, 15 U.S.C., § 1397(c), expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact. Subsection (c) reads: "Compliance with any Federal Motor Vehicle Safety Standard issued under this subchapter does not exempt any person from any liability under common law."
>
> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.

391 F.2nd at 506.

In *United States v. General Motors Corporation*, 518 F.2d 420, 434 (D.C. Cir. 1975), the court, quoting *Larsen* and citing the Safety Act's legislative history stated: "The Act was designed as a preventative measure supplementary of in addition to the common law negligence and product liability."

In *Knippen v. Ford Motor Company*, 546 F.2d 993 (D.C. Cir. 1976), the court rejected the argument advanced in *Evans v. General Motors Corporation*, 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1967), that "the imposition of design standards is a legislative rather than a judicial function" and held that District of Columbia law imposed upon the auto manufacturer "a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents." *Knippen*, 546 F.2d at 997, 999. The court then stated:

> *Evans* itself was decided in April 1966 as the Congress was considering but had not yet passed the National Traffic and Motor Vehicle Safety Act of 1966.
>
> * * *
>
> A court's reluctance to break new ground in an area subject to impending and potentially comprehensive legislation is understandable. The legislation which was passed just a few months after *Evans* explicitly provides, however, that the new law is not intended to "exempt any person from any liability under common law." National Traffic and Motor Vehicle Safety Act of 1966, § 108(c), 15 U.S.C. § 1397(c) (Supp.V. 1975).

Id. at 999-1,000.

The United States Courts of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits have all addressed the preemptive effect of the Safety Act, as have State appellate courts in Alabama, California, Colorado, Florida, Maryland, Massachusetts, Oregon, Pennsylvania, Texas and Wisconsin. A summary of these cases is

set forth in the Appendix hereto at A-20. In each of these cases the court concluded that Congress did not intend to preempt common law claims.

3. The Opinion Of The Minnesota Court Of Appeals Together With A Number Of State And Federal Decisions Constitute A Direct Conflict Over Application Of Federal Law To State Tort Law.

The precise issue of whether the Safety Act and the regulations which flow from it preempt a tort victim's "airbag claim" has been directly decided in some thirty cases, both State and Federal. The conflict between these decisions, which are summarized in and found at Appendix A-25, must be analyzed in light of the principle that the provision of tort remedies to compensate for personal injuries is a subject matter which this Court has traditionally regarded as within the scope of State superintendence. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). Additionally, Petitioner is unaware of any case in which this Court has found that Congress intended to preempt a common law tort claim where, as here, there would be no alternative remedy for compensation available. *See, e.g., Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 at 251, 266-67.

Perhaps the most comprehensive decision to date rejecting an auto manufacturer's argument that common law claims are preempted by the Safety Act is *Wood v. General Motors Corporation*, 673 F. Supp. 1108 (D. Mass. 1987). In *Wood*, United States District Court Judge William Young rejected GM's argument that common law claims are preempted by the Safety Act, stating:

> The statutory preemptive language of Section 1392(d) does not directly address State Common Law . . . Congress well knows how to expressly bar common law suits when it so desires. *See, e.g., Employee Retirement Income Security Act*, 29 U.S.C. §§ 1001, 1144(a)(c)(1) (chapter supersedes all State laws including "laws, *decisions*, rules, regulations, or other State action having the effect

> of law") (emphasis added). The failure of this express exclusion combined with the existence of the savings clause and the presumption against preemption leads this Court to conclude that there is no express preemption here.

Wood slip op. at 13-14.

Additionally, the *Wood* court held that there was no irreconcilable conflict between the Act and State Tort Law and therefore rejected the implied preemption argument. The court pointed to the fact that the Safety Act was predominantly concerned with highway safety and that that purpose was not frustrated by a potential State damage award.

Garrett v. Ford Motor Company, No. JH-86-582 (D. Md. August 21, 1987) is a rear shoulder harness case virtually identical to the instant case in that there is an on point Federal regulation which the defendant argues preempts Plaintiff's claim. The *Garrett* court rejected Ford's express preemption argument citing the Savings Clause, 15 U.S.C. § 1397(c). The court stated that if Congress had intended to expressly preempt State law it presumably would have done so and it certainly would not have included the Savings Clause. With respect to implied preemption, the Court in *Garrett* stated that the declared purpose of the Safety Act was to reduce deaths and injuries resulting from traffic accidents. Ford argued, as Toyota does here, that it was also a congressional purpose of the Safety Act to create uniformity in safety standards. The court in *Garrett* stated that uniformity was an incidental concern and not primary. The court put it this way:

> Congress intended the Act to save the lives of automobile passengers through safety standards; not the dollars of automobile manufacturers through uniformity.

Garrett slip op. at 4.

Given the interest of States in providing remedies and compensation for tort victims, this Court should grant the Writ so that the conflict in the interpretation of the Federal law herein may be resolved.

4. The Opinion Of The Minnesota Court Of Appeals Conflicts With Clear Congressional Intent In Enacting The Safety Act.

In determining whether Petitioner's common law claim is preempted, the Court's sole task is to ascertain the intent of Congress. *California Federal Savings and Loan Assoc. v. Guerra*, 107 S.Ct. 683, 689 (1987). Additionally, the analysis must begin with recognition that there is a presumption against preemption. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 265 (1943); *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947).

In application of the above principles this Court has repeatedly refused to find preemption unless Congress plainly intended it. *California Federal Savings & Loan Assoc.*, *supra*; *Silkwood v. Kerr-McGee Corporation*, *supra*.

The intent of Congress is evidenced by both legislative history and the plain language of the statute. The sole stated purpose of the Safety Act was to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1391. The Act, therefore, authorized the establishment of Federal Motor Vehicle Safety Standards which were to be "*minimum* standards for performance or motor vehicle equipment performance . . ." 15 U.S.C. § 1391(2) (emphasis added).

Congress, fully aware that it was legislating in an area previously governed only by state law, explicitly addressed what it did and did not intend to preempt in two separate sections of the Safety Act. Section 1392(d) explained the preemptive effect that Congress intended the Federal Standards to have on state and local safety standards:

> Section 1392(d) — Whenever a Federal Motor Vehicle Safety Standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard application to the same aspect of performance of such vehicle or item of the equipment which is not identical to the Federal standard.

There is no mention of common law in this section. Taking into consideration the presumption against preemption it cannot be said that Congress' "clear and manifest purpose" was to preempt state common law court claims."

Any doubt or ambiguity was put to rest with Section 1397(c) of the Act which states:

> (c) *Continuation of Common Law Liability* Compliance with any Federal Motor Vehicle Safety Standard issued under this subchapter does not exempt any person from any liability under common law.

Read together, with the presumption against preemption in mind, the language of these two sections makes Congress' intent clear. Section 1392(d) preempts state and local standards governing the same aspect of performance as Federal Standards and § 1397(c) expressly preserves all common law claims. The Minnesota Court of Appeals' interpretation reads § 1397(c) out of the Act since § 1392(d) would only have preempted matters regarding the "same aspect of performance."

In *Reed v. Ford Motor Company*, 679 F. Supp. 873 (S.D. Ind. 1988), the Federal District Court, when faced with the Ford's preemption argument stated:

> Yet, the first basic step in a question of Federal preemption — as it is in any question statutory interpretation — is to *read the language of the statute*. (Citations omitted)
>
> If Ford had taken this step *prior* to filing its motion to dismiss, it would have read the § 1397(c) of the Safety Act. . . .
>
> The court finds it difficult to imagine a clearer expression of congressional intent *not* to preempt State common law.

679 F. Supp. at 880 (emphasis in original).

The Safety Act's legislative history also demonstrates that common law claims are not preempted. The original version of the Safety Act did

not contain a version of what is now § 1397(c). Nevertheless, the Senate Committee Report was quite explicit on the subject. It stated:

> Moreover the Federal Minimum Safety Standards need not be interpreted as restricting state common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. S.Rep. No. 1301, 89th Cong., 2nd sess. 12 (1966).

During the debate on the floor of the Senate, the bill's sponsor, Senator Magnuson, noted "Compliance with Federal Standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was." 112 Cong. Rec. at 14320 (1966).

In the House, Section 1397(c) was added. The House Committee Report summarized the intent of this section as follows:

> It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to *warranty*, *contract*, and *tort liability*.

H.R. Rep. No. 1776, 89th Cong., 2nd sess. 24 (1966) (emphasis added).

In debate on the floor of the House, Congressman Dingell of Michigan argued in opposition to criminal penalties for violation of Federal Standards stating, "We have preserved *every single common law remedy* that exists against the manufacturer for the benefit of a motor vehicle purchaser. This means that *all* of the *warranties* and *all of the other devices of common law* which are afforded to the purchaser *remain* in the buyer, and they can be exercised against the manufacturer."
112 Cong. Rec. 19663 (1966) (emphasis added).

The National Highway Transportation Safety Administration ("NHTSA") has said that the Safety Act was not intended to preempt any common law claims. In a letter by NHTSA chief counsel in response to the plaintiff's attorney in *Dawson v. Chrysler Corporation*, 630 F.2d 950 (3rd Cir. 1980), the chief counsel stated:

> § [1392(d)] is limited to the effect of Federal Standards on state regulations covering the same aspects of performance. § [1397(c)] of the Act governs the effect of Federal Standards on product liability suits.

Copies of these letters are kept in NHTSA's interpretations file open to members of the public. See letter dated January 5, 1981 in Petitioner's Appendix at A-86. These opinions have been determined to be "entitled to great weight as they constitute part of the body of informed experience and judgment of the agency to whom Congress has delegated appropriate authority." *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

5. The Decision Of The Minnesota Court Of Appeals Conflicts With A Decision Of The Supreme Court Of The United States.

In *Silkwood v. Kerr-McGee, supra*, defendant argued that the Atomic Energy Act preempted plaintiff's state law remedies for injuries received when the plaintiff was contaminated working at a nuclear energy plant. This Court acknowledged that there was little doubt that the primary purpose of the Atomic Energy Act was to promote the development of nuclear power. The Court, however, cited an additional purpose of the Act that the development of nuclear power be consistent with the health and safety of the public. *Id.* at 257. The Court recognized that there was tension between the conclusion that nuclear safety regulation was the exclusive concern of the Federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. The Court stated that "Congress intended to stand by both concepts and to tolerate whatever tension there was between them." 464 U.S. at 256. These principles of preemption of State-created tort remedies have been ignored or misapplied in the instant case and other cases wherein courts have determined that the tort remedies are preempted.

The *Silkwood* court also stated that the presumption against preemption is strengthened where preemption would leave a putative plaintiff without an adequate remedy for violation of his or her state-created right. 464 U.S. at 251, 266-267.

VII. CONCLUSION

This Petition presents an important Federal question which affects the State-created rights of tort victims nationwide. The Minnesota Court of Appeals' opinion conflicts with Federal appellate and State court decisions. Additionally, courts which have addressed the precise issue presented here are split and the United States Supreme Court, therefore, ought to decide the proper application of Federal constitutional and statutory law to State common law. The Minnesota Court of Appeals' decision conflicts with United States Supreme Court authority and principles found in *Silkwood*, *supra*, as well as clear Congressional intent.

It is respectfully requested that the Writ be granted.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

C1-87-1231

JAN MARIE WICKSTROM, by H. S. WICKSTROM
and JOHN RING, conservators of the person
and Estate of Jan Marie Wickstrom,

Appellant,

vs.

MAPLEWOOD TOYOTA, INC., ET AL.,

Respondents,

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Jan Marie Wickstrom for further review be, and the same is, denied.

Dated: 2-17-88

BY THE COURT:
Douglas Amdahl
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS

C1-87-1231

Ramsey County

Nierengarten, Judge

Jan Marie Wickstrom, by H. S. Wickstrom and John Ring, conservators of the person and Estate of Jan Marie Wickstrom,
Appellant,

vs.

Maplewood Toyota, Inc., et al.,
Respondents.

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Filed: December 22, 1987
Office of Appellate Courts

SYLLABUS

Appellant's claim with respect to use of air bags as an alternative safe design to remedy automobile design defects is expressly and impliedly preempted by federal law.

Affirmed.

Heard, considered and decided by Forsberg, Presiding Judge, Lansing, Judge, and Nierengarten, Judge.

OPINION

NIERENGARTEN, Judge

Jan Wickstrom brought a products liability action against Toyota Motor Corporation and its chain of distributors (hereinafter Toyota), alleging, *inter alia*, that an alternative safe design to remedy design defects in Wickstrom's Toyota Tercel was the use of an air bag in conjunction with the three-point seatbelt. Toyota moved for partial summary judgment on this portion of the claim. The trial court held that Wickstrom's "air bag" claim was preempted by federal law and directed entry of final judgment. Wickstrom appeals from the judgment. We affirm.

FACTS

In March 1983, Jan Wickstrom was driving her 1983 Toyota Tercel when she was struck head-on by a fleeing bank robber. Wickstrom was wearing her seatbelt and shoulder belt but was severely injured as a result of the accident. Wickstrom claimed her Tercel was negligently designed and manufactured and unreasonably dangerous for its intended purpose because, among other things, the car did not contain air bags.

ISSUE

Is Wickstrom's claim that her car was defective and unreasonably dangerous because of Toyota's failure to install air bags expressly or impliedly preempted by the National Traffic and Motor Vehicle Safety Act?

ANALYSIS

The National Traffic and Motor Vehicle Safety Act (NTMVSA) provides:

> (a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle

safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

(f) In prescribing standards under this section, the Secretary shall —

(1) consider relevant available motor vehicle safety date, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purpose of this chapter.

15 U.S.C.A. §1392 (1982). In addition, the NTMVSA provides that:

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C.A §1397(c).

In response to Congress' directive, the Department of Transportation promulgated Federal Motor Vehicle Safety Standard 208 which gave au-

tomobile manufacturers the choice of using seatbelts, air bags, or a combination of seat belts and air bags. *See* 49 C.F.R. §571.208 (1982).

If Wickstrom's suit against Toyota leads to a verdict for Wickstrom, such a verdict reduced to judgment is a form of state action, at least as it related to preemption. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Vanover v. Ford Motor Co.*, 632 FSupp. 1095, 1096 (E.D. Mo. 1986). Air bags clearly involve the same aspect of performance as seat belts, that of passenger restraint. A state tort award for failure to install air bags would conflict with the choices given manufacturers under Safety Standard 208. Such a result is preempted by 15 U.S.C.A. §1392(d).

Wickstrom contends the following "savings clause" of the NTMVSA preserves all common law claims and therefore her air bag claim as well.

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C.A. §1397(c).

General savings clauses will not preserve common law claims which interfere with or frustrate the purposes of the act. *See International Paper Co. v. Ouellette*, ____U.S. ____, 107 S.Ct. 805, 812 (1987) (Congress does not intend to undermine carefully drawn statues through general savings clauses). The purpose of such savings clauses is

> not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute.

Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550, 555 (Minn. 1984) (quoting *Pennsylvania Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915). The clear meaning of the NTMVSA clause is that compliance with federal standards will not protect automobile manufacturers from liability for design defects in connection with matters *not* covered by federal standards.

Even if Wickstrom's air bag claim was not expressly preempted it is impliedly preempted.

> [I]f Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469 (1984) (citations omitted).

The "full purposes and objectives of Congress" in enacting the NTMVSA are:

> to reduce traffic accidents and deaths and injuries to purposes resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce.

15 U.S.C.A. §1381. Based on the legislative history, Congress clearly was aware of the potentially increased safety aspects provided by air bags. However, air bags also present problems. The reliability of air bags is unproven and accidental air bag inflation is a potential hazard to a car's occupants. Cost is another consideration. *See* Waters, *Air Bag Litigation: Plaintiffs, Start Your Engines*, 1 Pepperdine L. Rev. 1063, 1072-73 (1986).

All of these arguments have been presented to Congress and the Department of Transportation and yet the Department has specifically chosen not to make air bags mandatory. Not only that, 15 U.S.C.A. §1410b prohibits the Department of Transportation from requiring air bags without prior congressional approval. *See* 15 U.S.C.A. §1410b(b)-(d). Congress has chosen to give manufacturers a choice of occupant restraint systems. A court decision creating common law liability for the failure to install air bags

> will effectively force automobile manufacturers to choose the air bag option over other statutorily approved options. An automobile

> manufacturer faced with the prospect of choosing the air bag option, or facing potential exposure to compensatory and punitive damages for failing to do so, has but one realistic choice. *A court decision that removes the element of choice authorized in the occupant crash safety regulations will frustrate the statutory scheme.*

Baird v. General Motors Corp., 654 FSupp. 28, 32 (N.D. Ohio 1986) (emphasis added). In *Baird*, the court found that air bag claims were impliedly preempted.

The trial court recognized that the legislative history makes it clear that a "significant subsidiary purpose — itself intended to promote the primary goal — was to create uniform motor vehicle safety standards." Allowing individual state juries and courts to create different standards clearly would frustrate this purpose. *Accord Cox v. Baltimore County*, 646 FSupp. 761, 764 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 FSupp. 1095, 1096 (E.D. Mo. 1986).

DECISION

Wickstrom's claim with regard to the absence of air bags in her automobile is expressly and implicitly preempted by federal law.

Affirmed.

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Jan Marie Wickstrom, by H. S. Wickstrom and John Ring, conservators of the person and Estate of Jan Marie Wickstrom,
Plaintiffs,

v.

Maplewood Toyota, Inc., a Minnesota corporation, Toyota Motor Distributors, Inc. a California corporation, Toyota Motor Sales, U.S.A., Inc., a California corporation, Toyota Motor Corporation, a Japanese and Louis Chapman,
Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

File No. 470771

The above matter was heard by the undersigned at a special term of the above court held at 10:30 o'clock a.m. on Friday, February 6, 1987, at Room 1521 of the Ramsey County Courthouse in the City of St. Paul.

The matter was before the Court for an order granting summary judgment dismissing plaintiffs' "airbag claim". Said motion was made pur-

suant to Rule 56 of the Minnesota Rules of Civil Procedure, on the grounds: (1) That Minnesota law neither recognizes nor encompasses any duty on the part of Toyota to install air bags in plaintiff's 1983 Toyota Tercel in addition to the three-point safety belt system worn by plaintiff at the time of the accident; (2) that the applicable federal statutes and regulations preempt any state law duty to install air bags in the subject vehicle; and (3) that plaintiff, as a matter of law, cannot prove that the subject vehicle was defective and unreasonably dangerous because it lacked airbags.

Said motion is based upon the Supremecy Clause of the United States Constitution, the National Traffic and Motor Vehicle Safety Act of 1966, Federal Motor Safety Standard 208 and its regulatory record, and the memorandum of law attached to said motion.

Bowen and Brooke, 600 Midwest Plaza West, 801 Nicollet Mall, Minneapolis, Minnesota, 55402, appeared by David W. Graves, Jr., and Wayne D. Struble as counsel on behalf of defendants Maplewood Toyota, Inc., Toyota Motor Distributors, Inc., Toyota Motor Sales, U.S.A., Inc., and Toyota Motor Corporation in support of said defendants' motion. Jardine, Logan & O'Brien, 1900 Conwed Tower, 444 Cedar Street, St. Paul, Minnesota, 55101, appeared by John R. O'Brien, James A. Jardine, and Pierre N. Regnier as counsel on behalf of plaintiff in opposition to defendants' said motion.

The issues presented by defendants' said motion were submitted to the Court upon said motion, defendants' legal Memorandum of Law attached to said motion, Plaintiff's Response to Defendants' Motion for Summary Judgment, Reply Memorandum of Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., Toyota Motor Distributors, Inc., and Maplewood Toyota, Inc. in Support of Toyota's Motion for Summary Judgment Dismissing Plaintiff's "Air Bag Claim", the oral arguments of counsel, all prior proceedings herein, and all the papers on file with the clerk of court in this matter.

All of the foregoing have been carefully reviewed and considered. The Court finds that there is no genuine issue as to any material fact and that

the Toyota defendants are entitled to judgment as matter of law that plaintiff's "airbag claim" is preempted by federal law.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That defendants Toyota Motor Corporation, Toyota Motor Sales, U.S.A, Inc., Toyota Motor Distributors, Inc., and Maplewood Toyota, Inc. are entitled to partial summary judgment that plaintiff's "airbag claim" be dismissed with prejudice from plaintiff's Complaint and cause of action.

2. That on reconsideration, the Order Denying Motion for Partial Summary Judgment made and filed herein November 26, 1986, is reaffirmed.

3. The attached Memorandum is made a part of this Order.

ORDER FOR JUDGMENT

Pursuant to the provisions of Rule 54.02, Minnesota Rules of Civil Procedure, the Court finds there is no just reason for delay of the entry of final judgment and, therefore it is ordered and directed that judgment upon the foregoing Order be entered forthwith.

James M. Lynch
Judge of District Court

Dated this 12th day of March, 1987.

MEMORANDUM

Partial summary judgment is granted upon the grounds that plaintiff's "airbag claim" is preempted by federal law.

FACTS

On March 31, 1983, defendant Louis Chapman, a criminal fleeing from a robbery with police officers in hot pursuit, smashed the Pontiac Catalina vehicle he was driving into the 1983 Toyota Tercel automobile

owned and driven by plaintiff. It was a frontal or angle-frontal collision. Although plaintiff survived the collision, she sustained injuries including a serious and permanent brain injury for which she seeks damages by this action.

THE CLAIM

In her Complaint, plaintiff does not allege that any defect in the design or manufacture of her automobile caused the accident itself. Instead, she claims that her 1983 Toyota Tercel should have been more "crashworthy", i.e. should have afforded a higher level of protection against injury from the "second collision" between her and the interior of her vehicle following the "first collision" between the accident vehicles.

Plaintiff's airbag claim is summarized in her response to defendants' discovery:

> 14. State all of the facts upon which you base the allegations in your Complaint that the subject 1983 Toyota Tercel was defective and unreasonably dangerous to the plaintiff.
>
> *Answer:*
>
> Toyota Motor Corporation failed to design and manufacture the subject Toyota Tercel with *airbags* despite the fact that it was feasible to do so and that such technology was available to Toyota Motor Corporation, Inc.

Answers to Interrogatories, Interrogatory No. 14 (emphasis added).

This is the "airbag claim" which defendants' motion seeks to dismiss.

The 1983 Toyota Tercel automobile driven by plaintiff came equipped with a standard three-point lap-shoulder safety belt system sanctioned by Federal Motor Vehicle Safety Standard 208 (FMVSS 208). As part of that system, the vehicle included a red instrument panel light and an audible buzzer designed to encourage occupant use of the shoulder and lap belts.

Plaintiff was using the three-point safety belt system at the time of the accident. Plaintiff claims that the restraint system provider in her

vehicle was negligently designed, manufactured and unreasonably dangerous for its intended use.

Plaintiff states that, as part of her proof, she will show that there were alternative safe designs for the restraint system provided. That one alternative safe design, consistent with the state of the art at the time of the manufacture of plaintiff's vehicle, was the use of an adequate passive restraint system,[1] namely, an airbag in conjunction with a properly functioning three-point safety belt system. Plaintiff argues that this alternative would have prevented plaintiff's enhanced injuries in the accident.

ISSUE

Is this state law tort claim for uncrashworthiness based upon the lack of an airbag or airbags preempted by the National Traffic and Motor Vehicle Safety Act ("the Safety Act")?

ANALYSIS

Article VI, clause 2, of the United States Constitution, commonly called the Supremecy Clause, requires that *all* conflicts between federal law and state law be resolved in favor of the federal law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

As confirmed by the United States Supreme Court, the Supremecy Clause prohibits the enforcement of *any* state law that conflicts with the exercise of federal power. *E.g.*, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982).

In recognition of federal supremecy, the Minnesota Supreme Court has invalidated or refused to give effect to conflicting state laws and state claims in a variety of settings. *E.g.*, *Fairview Cemetary Association v. Eckberg*, 385 N.W.2d 812 (Minn. 1986) (Federal Arbitration Act preempts state statute creating private remedies for persons damaged by illegal offer, sale, or purchase of securities); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550 (Minn. 1984) (Federal Communications Act preempts state common law tort claim for nuisance).

EXPRESS PREEMPTION

The 1966 Safety Act directs the Secretary of Transportation to prescribe Federal Motor Vehicle Safety Standards that "meet the need for motor vehicle safety." 15 U.S.C. §1392. Congress defined "motor vehicle safety" as the degree of protection needed to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction, or performance of motor vehicle and . . . unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. §1391(1). In promulgating any such standard, the Secretary must consider whether it is "reasonable, practical and appropriate." 15 U.S.C. §1392(f).

In 1967, the Department of Transportation adopted Federal Motor Vehicle Safety Standard 208 requiring the installation of seat belts in automobiles. In 1970, this Safety Standard was amended to include a set of injury criteria that had to be met by some form of passive restraint system, including but not limited to airbags, for all occupant positions of all cars manufactured after July 1974. In 1974, Congress responded to Transportation Department proposals and expressly prohibited the Department from requiring airbags or any other non-belt safety system unless the Secretary first (a) followed special hearing procedures, and (b) provided both houses of Congress an opportunity to review the proposed requirement. 15 U.S.C. §1410b(b)-(d).

Congress has expressly preempted attempts by states to establish safety standards different from a Federal Motor Vehicle Safety Standard governing the same vehicle feature by the preemption provision which states that:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or items of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any state from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal Standard.

15 U.S.C. §1392(d).

This preemption provision together with FMVSS 208 and the provisions of 15 U.S.C. Section 1410b(b)-(d), prohibiting the Department of Transportation from requiring airbags without Congressional approval, constitutes an express preemption of the states' ability to impose any sort of airbag requirement. *Vancover v. Ford Motor Co.*, 632 FSupp. 1095 (E.D. Mo. 1986); and *Cox v. Baltimore County, et al*, 646 FSupp. 761 (D.Md. 1986). *See also Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. Nov. 4, 1987).

Plaintiff argues that there is no express preemption because a jury hearing a tort case is not a "State or political subdivision of a State" and because a common law rule of tort law permitting recovery of money damages for the lack of airbags is not a "safety standard." These argu-

ments are without merit. Obviously, a jury verdict must be based upon the law which governs it and the "establishment" of the "safety standard" is not the return of the verdict itself but the rendering of a judicial decision sustaining it. Incontrovertibly, the latter constitutes state action. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964); *Robinson v. Florida*, 378 U.S. 153, 156, 84 S.Ct. 1693, 1695, 12 L.Ed.2d 771 (1964). Additionally, there is nothing in the language of the Safety Act or in its legislative history to suggest that the term "safety standard" is intended to encompass only standards adopted by a regulatory body.

If this or any other Court should hold an automobile manufacturer liable in tort for failing to install an airbag system, it would have the effect of requiring all manufacturers to install airbags or face the possibility of enormous liability in tort. Such a rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard and has been held to be a form of state regulation subject to the Supremecy Clause. *See San Diego Building Trades Council v. Garmon*, 359 M.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

IMPLIED PREEMPTION

It is not necessary for a federal statute to provide explicitly that state laws are preempted. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Preemption may also be implied.

> *[P]reemption should* not *be judged* on the basis that the federal government has so completely occupied [a] field of safety that state remedies are foreclosed but *on whether there is an irreconsilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objective of federal law.* (Emphasis added.)

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).

Even if the plaintiff's airbag claim is not expressly preempted by the Safety Act, the Act impliedly preempts such a claim. The primary pur-

pose of the Safety Act is to promote safety of the highways. However, the legislative history of the Act makes clear that a significant subsidiary purpose — itself intended to promote the primary goal — was to create uniform motor vehicle safety standards. *See* H.R.Rep. No. 1776, 89 Cong., 2d Sess. (1966); S.Rep. No. 1301, 89th Cong., 2d Sess (1966), U.S. Code Cong. & Admin. News 1966, P. 2709. This underlying purpose would be entirely frustrated by permitting individual states to adopt tort rules which would permit liability to be imposed upon manufacturers because of the absence of airbags. *Cox v. Baltimore County, et al, supra.*

SAVINGS CLAUSE

Plaintiff argues that the savings clause of 15 U.S.C. Section 1397(c) expressly preserves from preemption all common law tort suits. That section provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." To read this clause as broadly as urged by plaintiff would result in its frustrating, indeed defeating, the purpose of the Safety Act of establishing uniform standards. Reasonably read in the context of the statutory objections, the clear meaning of the clause is that compliance with the federal standards does not protect an automobile manufacturer from liability for design or manufacturing defects in connection with matters not covered by the federal standards. *See Chicago v. North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981); *Cox v. Baltimore County, et al, supra.*

RECONSIDERATION OF NOVEMBER 26, 1986 ORDER

The Toyota defendants by their motion and supporting memoranda have argued, in substance, that the undersigned should reconsider the ruling made in the Order Denying Motion for Partial Summary Judg-

ment filed herein November 26, 1986, and grant defendants' motion upon the grounds that under Minnesota tort law, Toyota owed no duty to install airbags in the 1983 Tercel.

The undersigned has reviewed defendants' memoranda in support of said motion and plaintiff's memorandum in opposition thereto, has heard the arguments of counsel and has determined that no new arguments or law have been presented. Accordingly, the November 26, 1986 Order is reaffirmed.

James M. Lynch
Judge of District Court

1 An automotive safety device is characterized as "passive" rather than "active" when it requires no independent action by occupants to render it effective.

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
File No. 470771

CORRECTED JUDGMENT

Jan Marie Wickstrom, by H. S. Wickstrom and John Ring, conservators of the person and Estate of Jan Marie Wickstrom,

Plaintiffs

vs.

Maplewood Toyota, Inc., a Minnesota corporation, Toyota Motor Distrib-

utors, Inc., a California corporation, Toyota Motor Sales, U.S.A., Inc., a California corporation, Toyota Motor Corporation, a Japanese corporation and Louis Chapman,

Defendants

PURSUANT JUDGMENT ROLL

Pursuant to the Order Granting Partial Summary Judgment, Lynch, J., dated and filed 3-12-87: IT IS HEREBY ORDERED: "1. That defendants Toyota Motor Corporations, Toyota Motor Sales, U.S.A., Inc., Toyota Motor Distributors, Inc., and Maplewood Toyota, Inc., are entitled to partial summary judgment that plaintiff's "airbag claim" be dismissed with prejudice from plaintiff's Complaint and Cause of action.

2. That on reconsideration, the Order Denying Motion for Partial Summary Judgment made and filed herein November 26, 1986, is reaffirmed.

"Pursuant to the provisions of Rule 54.02, Minnesota Rules of Civil Procedure, the Court finds there is no just reason for delay of the entry of final judgment and, therefore, it is ordered and directed that judgment upon the foregoing Order be entered forthwith."

Now, on the motion of David W. Graves, Jr., said attorney, IT IS HEREBY ADJUDGED that summary judgment is entered as stated above.

Signed this 24th day of March 1987.

J.E. GOCKOWSKI
Court Administrator
By Clare O. Kimmel Deputy

National Highway Traffic Safety Admin., DOT §571.208

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2

or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option — frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option — head-on automatic protection system.* The vehicle shall —

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no actoin by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option — lap and shoulder belt protection system with belt warning.*

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position, have a seat belt warning system that conforms to S7.3.

SUMMARY OF APPELLATE CASES ADDRESSING PREEMPTIVE EFFECT OF THE SAFETY ACT

D.C. CIRCUIT: *Knippen v. Ford Motor Company*, 178 U.S. App. D.C. 227, 546 F.2d 993, 1000 (D.C. Cir. 1976) (turning signal and parking light design of 1968 Mercury found defective; Standard 108, governing lights and signals was effective January 1, 1968).

United States v. General Motors Corporation, 171 U.S. App. D.C. 27, 518 F.2d 420, 434 (D.C. Cir. 1975) (Safety Act "designated as a preventative measure supplementary of and in addition to the common law of negligence and product liability").

THIRD CIRCUIT: *Dawson v. Chrysler Corporation*, 630 F.2d 950 (3d Cir. 1980) (side door design found defective for insufficient strength despite compliance with Standard 214 governing side door strength).

FOURTH CIRCUIT: *Stonehocker v. General Motors Corporation*, 587 F.2d 151, 156-57 (4th Cir. 1978) (Safety Act prevents "evidence of compliance with the standard from exempting General Motors from negligence for a vehicle subject to the terms of the regulation").

FIFTH CIRCUIT: *Shipp v. General Motors*, 750 F.2d 418, 421 (5th Cir. 1985) (roof design found defective despite compliance with on-point Standard 216).

Dorsey v. Honda Motor Company Ltd., 655 F.2d 650, 656-657 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) (numerous aspects of design found defective despite compliance with on-point Standards 204, 207, 209, 210 and 301).

SIXTH CIRCUIT: *Sours v. General Motors Corporation*, 717 F.2d 1511, 1516-17 (6th Cir. 1983) ("the very safety statute upon which GM relies makes it abundantly clear that compliance with the regulations promulgated thereunder does not immunize a manufacturer from common law liability"; roof design held defective for insufficient crush strength; Standard 216, adopted after car designed, "did no more than establish a minimum standard; it did not presume to lay out a template for proper roof design").

Chrysler v. DOT, 472 F.2d 659, 670 n.13 (6th Cir. 1972) ("compliance with Federal standards is not a defense to a products liability action for failure to use reasonable care in design or construction to avoid subjecting the user to an unreasonable risk of injury").

SEVENTH CIRCUIT: *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983) ("compliance with applicable federal standards is relevant, though not conclusive, in a products liability case").

EIGHTH CIRCUIT: *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (federal standards do not preclude a finding that steering assembly design defective because of rearward displacement; shortly after case decided, Standard 204 becomes effective, limiting rearward displacement of steering assemblies).

TENTH CIRCUIT: *Fox v. Ford Motor Company*, 575 F.2d 774, 784 (10th Cir. 1978) ("Ford admitted that the federal standars are not designed to eliminate common law negligence; that they are minimum standards"; rear seat belt design found defective for lack of shoulder belts, despite compliance with on-point Standard 209, which did not require shoulder belts in rear).

ALABAMA: *General Motors Corporation v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985) (Safety Act and regulations promulgated pursuant thereunder "do not preempt or prohibit suits, like the present one, brought in state court under common law causes of action"; gas tank design found defective despite compliance with on-point Standard 301).

CALIFORNIA: *Buccery v. General Motors Corporation*, 60 Cal. App. 3d 533, 132 Cal. Rptr. 605, 609 (Cal. App. 1976); (truck design can be found defective for lack of head restraints although Standard 202, governing head restraints, expressly excludes head restraint requirement for trucks).

COLORADO: *Roberts v. May*, 41 Colo. App. 82, 583 P.2d 305, 308 (Colo. App. 1978) (Standards are "statutory minima, and are not conclusive on the question of a manufacturer's liablity"; dashboard design can be found defective for insufficient protection during crash despite compliance with Standard 201, which governs dashboard protection during crash).

FLORIDA: *Lollie v. General Motors Corporation*, 407 So. 2d 613, 617 (Fla. App. 1981) (compliance with Standard 301, governing fuel tank integrity, does not preclude jury finding that fuel tank design defective for insufficient integrity).

MARYLAND: *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974) (seat assembly can be found defective despite compliance with on-point Standard 207).

MASSACHUSETTS: *H.P. Hood & Sons, Inc. v. Ford Motor Company*, 370 Mass. 69, 345 N.E. 2d 683, 688 (Mass. 1976) (compliance of Ford's defect notice with federal standards is not a defense; common law claims are not preempted).

OREGON: *McMullen v. Volkswagen of America*, 274 Or. 83, 545 P.2d 117, 120 (Ore. 1976) (seat assembly and anchoring design can be found defective despite compliance with on-point Standard 207).

PENNSYLVANIA: *Jackson v. Spagnola*, 349 Pa. Super. 471, 503 A.2d 944, 948 (Pa. Super. 1986) (compliance with standards is "only a piece of the evidentiary puzzle and does not grant immunity from strict liability"; seat design can be found defective for insufficient protection upon impact despite compliance with Standard 207, governing seat performance in case of impact).

TEXAS: *Turner v. General Motors Corporation*, 514 S.W. 2d 497, 505-506 (Tex. Civ. App. 1974) (federal standards do not preclude finding roof design defective for insufficient crush strength; Standard 216 governing roof crush resistance effective one year before decision).

WISCONSIN: *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W. 2d 431, 438 (Wis. 1975) ("Congress felt that federal regulations should be supplementary to the common law of products liability"; fuel tank design can be found defective for insufficient integrity despite compliance with Standard 301 governing fuel tank integrity).

SUMMARY OF STATE AND FEDERAL CASES ADDRESSING PREEMPTIVE EFFECT OF SAFETY ACT ON AIRBAG CLAIMS

1. *Lynch v. Mims*, Case No. GCG 85-0019, Cir. Ct., 10th Cir., Polk County, Fla. (Aug. 20, 1985). Circuit Judge Randall McDonald denied Ford's motion to dismiss based on preemption grounds.

2. *Barfels v. Holman Imports, Inc.*, No. 85-1901-CB, 17th Cir., Broward County, Fla., (Sept. 25, 1985). The court denied Mitsubishi's motion to dismiss on preemption grounds and stated that 15 U.S.C. §1397(c) expressly negates any intention on the part of Congress to occupy the field and leaves common law liabilities undisturbed.

3. *Morgan v. Noble*, Knott Cir. Ct., No. 84-CI-136/137 and Breathhitt Cir. Ct. No. 85-CI-309, Pikeville, KY, (Feb. 17, 1986). Ford's motion for partial summary judgment denied on preemption and other grounds.

4. *Munson v. Pearcy*, No. B-84, 570, 163rd Judicial Dist. Ct., Orange County, TX (May 15, 1986). Partial summary judgment motion denied on preemption and other grounds.

5. *Steenbergen v. Ford Motor Company*, No. 85-15718-C, Tex. Dist. Ct. (June 30, 1986). Ford's motion for summary judgment on preemption and other grounds denied.

6. *Murphy v. Nissan Motors*, 650 FSupp. 922 (E.D. N.Y. 1987). Nissan's motion for summary judgment denied on preemption grounds and state law grounds.

7. *Fisher v. Chrysler*, C.A. No. 85-6999-T, U.S. Dist. Ct. MA. Judge Joseph Tauro denied Chrysler's motion for summary judgment orally from the bench on Dec. 18, 1986.

8. *Wood v. General Motors Corp.*, 673 FSupp. 1108, U.S. Dist. Ct. (MA 1987). General Motors' summary judgment motion denied on preemption and common law grounds.

9. *Burge v. American Honda Motor Co., Inc.*, No. 41-74-75, Sup.Ct. Cal. (June 30, 1987). Defendant's motion for summary judgment on preemption grounds denied.

10. *Russell v. Johnson*, Case No. 83-3931 CA-WJN (Fla. 20th Cir., Lee County, July 17, 1987). Ford's motion for partial summary judgment on preemption grounds denied.

11. *Garrett v. Ford*, Civ. Act. No. JH-86-582 (U.S. Dist. Ct. D. Md., Aug. 21, 1987). Plaintiff's claim car defective because it lacked rear shoulder harnesses. Ford's motion for summary judgment on preemption grounds denied despite on-point federal standard.

12. *Salinas v. Toyota*, No. 85-6068-B (Dist. Ct., Oct. 12, 1987). Motion for summary judgment on implied and expressed preemption grounds denied.

13. *Kimbrel v. Honda*, No. 85-V009 (GA. Super. Ct., Nov. 19, 1987). Defendant's federal law preemption motion denied.

14. *Richart v. Ford Motor Co.*, ___FSupp. ___(D.N.M. Jan. 14, 1988). In an extensive memorandum the court denied defendant's motion for preemption on both express and implied preemption grounds despite the *Kitts* opinion cited herein, *infra*.

15. *Vanover v. Ford*, 632 F.Supp. 1095 (E.D. MO. 1986). Ford's motion for summary judgment granted on preemption grounds. No discussion of savings clause.

16. *Phillips v. Namie*, No. 85-33951-CA-07 (Fla. Cir. Ct. Sept. 22, 1986). General Motors' motion for partial summary judgment on preemption grounds granted.

17. *Cox v. Baltimore County*, 646 F.Supp. 761 (D. MD 1986). Ford's preemption motion granted.

18. *Soboscienski v. Ford Motor Company*, No. 2 NO-85-246 (Alaska Super. Ct., Oct. 28, 1986). Defendant's motion for summary judgment on preemption grounds granted.

19. *Baird v. General Motors Corp.*, 654 F.Supp. 28 (N.D. Ohio, 1986). General Motors' motion for summary judgment granted. Court held no express preemption but granted on basis of implied preemption.

20. *Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. 1986). Defendant's motion for summary judgment on preemption grounds granted.

21. *Puzio v. General Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987). Defendant's preemption motion granted, court stated that FMVSS 208 established a minimum and maximum standard.

22. *Hughes v. Toyota Motor Corp.*, 676 F.Supp. 1039 (D. Mont. 1987). Airbag claim dismissed on preemption grounds.

23. *Wattelet v. Toyota Motor Corp.*, 676 F.Supp. 1039 (D. Mont. 1987). Airbag claim dismissed on preemption grounds.

24. *Donnolly v. General Motors Corp.*, No. 86-576-JU (D. Ore. July 31, 1987). Ford's motion for summary judgment granted on preemption grounds.

25. *Distler v. General Motors Corp.*, No. 4-86-821 (D. Minn. Sept. 3, 1987). Defendent's motion for partial summary judgment on preemption grounds granted from the bench.

26. *Bass v. General Motors*, No. SA-86-CA-279 (W.D. Tex. July 24, 1987). Motion for partial summary judgment on preemption grounds granted and affirmed on reconsideration.

27. *Gardner v. Honda Motor Co., Ltd.*, No. H-72107 (S.Ct. N.Y. Aug. 26, 1987). Defendant's motion for partial summary judgment on federal preemption grounds granted.

28. *Kitts v. General Motors Corp.*, Civ. No. 85-0967 JC (D. N.M. Sept. 29, 1987). *Rev. granted*, No. 87-2517 (10th Cir.). Defendant's motion for partial summary judgment granted. Review granted by 10th Circuit. Case conflicts with *Richart, supra*.

29. *Staggs v. Chrysler Corp.*, 678 F.Supp. 270 (N.D. GA 1987). Court held the Safety Act did not expressly preempt plaintiff's claim but granted motion on implied preemption basis.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY, FLORIDA

SHERRY ANN LYNCH,

Plaintiff,

vs.

LOUIE T. MIMS, Sheriff of Polk County;
and FORD MOTOR COMPANY, a Delaware Corporation authorized to do business in Florida,

Defendants.

ORDER

This matter came before the Court upon the Motion of Defendant, FORD MOTOR COMPANY, to Dismiss the Complaint. The Court has carefully reviewd the Complaint, has heard arguments of counsel for the respective parties, and has carefully considered the Memoranda and Supporting Cases filed by the respective parties. It is, therefore,

ORDERED AND ADJUDGED as follows:

1. Defendent FORD MOTOR COMPANY'S Motion to Dismiss Count II (Implied Warranty of Merchantability) and Count III (Implied Warranty of Fitness for a Particular Purpose) is granted. The Plaintiff shall have twenty (20) days to amend the allegations of Count II and Count III.

2. The remaining allegations of the Plaintiff's Complaint are sufficient to state a cause of action against Defendant FORD MOTOR COMPANY upon theories of strict liability and negligence. The crashworthiness theory of liability announced in *Larsen v. General Motors Corporation*, 391 F.2d 495 (9th Cir. 1968) was adopted by the Florida Supreme Court in *Ford Motor Company v. Evancho*, 327 So.2nd 201 (Fla. 1976). The fact that the allegations of the Complaint relate to a particular safety device do not preclude the application of that theory. Act, 15 U.S.C. §1381, et. seq. was intended by Congress to, and does in fact, preserve and encourage the continuing use and development of State Common Law Remedies. The Plaintiff's crashworthiness claims are not prohibited by the Supremecy Clause of the United States Constitution nor are they violative of the Commerce Clause of the United States Constitution.

Defendant, FORD MOTOR COMPANY's remaining arguments in support of its Motion to Dismiss are without merit.

Defendant FORD MOTOR COMPANY's Motion to Dismiss the remaining allegations of the Complaint (other than Count II and Count III) is therefore denied.

DONE AND ORDERED in Chambers this 20th day of August, 1985.

RANDALL G. McDONALD
Circuit Judge

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA.

Case No. 85-1901-CB

JULIA BARFELS and UWE BARFELS,
as Husband and Wife,

Plaintiffs,

vs.

HOLMAN IMPORTS, INC., f/k/a FT. LAUDERDALE MITSUBISHI, INC.,
and MITSUBISHI MOTOR SALES OF AMERICA, INC.,

Defendants.

ORDER

THIS CAUSE having come on to be heard on Defendant MITSUBISHI MOTOR SALES OF AMERICA, INC.'s Motion to Dismiss, and the Court having heard argument of counsel, and having been otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Count I, sounding in negligence, shall stand as pled.

2. As to Count II of Plaintiff's First Amended Complaint, Defendant, MITSUBISHI MOTOR SALES OF AMERICA, INC.'s Motion to Dismiss is

DENIED. However, the Court finds that Count III is defective as to Paragraph 29, in that it incorporates 13 and 17 from Count I.

Inasmuch as Count III is premised upon breach of implied warranty, allegations focusing upon Defendant's conduct are improper as to Count III. Therefore, paragraphs 13 and 17 are stricken from incorporation into Count III. *See SANSING v. FIRESTONE TIRE & RUBBER CO.*, supra at §96. *See also DUNRAM-BUSH, INC. v THERMO-AIR SERVICES, INC.*, 351 So.2d 351, 353 (Fla. 4th DCA 1977). *See also* Fla. R.C.P. Supreme Court of Florida Form 1.949.

4. As to Count IV of Plaintiff's First Amended Complaint, Defendant, MITSUBISHI MOTOR SALES OF AMERICA, INC.'s Motion to Dismiss is DENIED, as this Court finds sufficient specificity in Plaintiff's Paragrphas 11-16, and 36-40. FRCP 1.120(b): *KUTNER v. KALISH*, 173 So.2d 763, 765 (Fla. 3rd DCA 1965) *cert. den.* 183 So.2d 210 (Fla. 1965); *See GARISCHE v. TEXTURED COATINGS OF AMERICA, INC.*, 352 So.2d 1207,1208 (Fla 4th DCA 1977).

5. As to Count V of Plaintiff's First Amended Complaint, Defendant MITSUBISHI MOTOR SALES OF AMERICA, INC.'s Motion to Dismiss is DENIED. However, the Court finds that Count V is defective as to Paragraph 41, in that Plaintiffs have incorporated paragraphs 10, 13 and 17 into Count V, which is premised upon breach of express warranty. Allegations focusing upon Defendant's conduct are improper as to Count V. Therefore, paragraphs 10, 13 and 17 are stricken from Count V. *See DUNHAM-BUSH, INC. v THERMO-AIR SERVICES, INC., supra* at 353. *See* 672.1-313 Fla. Stat.

6. As to all Counts of Plaintiff's First Amended Complaint praying for punitive damages, Defendant, MITSUBISHI MOTOR SALES OF AMERICA, INC.'s Motion to Dismiss is DENIED. This Court finds that Counts seeking such relief have been sufficiently pled, subject to the foregoing provisions of this Court's Order. *See PIPER AIRCRAFT CORP. v. COULTER*, 426 So.2d 1108 (Fla. 4th DCA 1983); *See also DORSEY v. FLORIDA MOTOR CO., LTD.*, 655 F.2d 650 (5th Cir. 1981).

7. As to Defendants, MITSUBISHI MOTOR SALES OF AMERICA, INC.'s Motion to Dismiss re Preemption, is hereby DENIED, as 15 U.S.C. Section 1397(c) expressly negatives any intention on the part of Congress to occupy the field and leaves common law liabilities undisturbed. *WOLMER v. CHRYSLER CORP.*, 10 FLW 1761 (Fla. 5th DCA 1985).

Defendant, MITSUBISHI MOTOR SALES OF AMERICA, INC., shall have twenty days from the date of this Order to answer Plaintiff's First Amended Complaint:

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this __day of September, 1985.

CIRCUIT JUDGE

KNOTT CIRCUIT COURT
NOS. 84-CI-136/137
BREATHITT CIRCUIT COURT NO. 85-CI-309

OLLIE MORGAN, et al. — PLAINTIFFS

vs.

ROBERT NOBLE, et al. — DEFENDANTS

and

JEFFREY MORGAN — PLAINTIFF

vs.

ROBERT NOBLE, et al. — DEFENDANTS

ORDER

This is a product liability action in which plaintiffs claim that a 1982 Ford Escort was uncrashworthy in at least four respects, as follows:

1. The vehicle lacked sufficient structural integrity to provide adequate occupant crash protection;

2. There was no passive restraint system;

3. The seating system was defective; and

4. The instrument panel was defective, allowing a sharp edge to protrude during failure.

Ford has moved for partial summary judgment contending (a) that plaintiffs' airbags/passive restraint claims are pre-empted by the National Traffic and Motor Vehicle Safety Act; (b) even if not pre-empted, plaintiffs' claims impose an unreasonable burden on interstate commerce; and (c) that as a matter of Kentucky law, a manufacturer can have no duty to install an airbag or passive restraint system in a particular vehicle. The parties filed memoranda, which have been thoroughly considered, and the court heard oral argument on January 31, 1986.

On the basis of the evidence in the record at present, the defendant's motions are overruled. The National Traffic and Motor Vehicle Safety Act, 15 U.S.C., Section 1381, et seq., was intended by Congress to supplement, not obviate, the common law. Section 1397(c) provides:

> "Compliance with any federal motor vehicle safety standard issued under the set chapter does not exempt any person from any liability under common law."

The plaintiffs' airbags/passive restraint claims are not prohibited by the supremacy clause of the United States Constitution nor are they violative of the Commerce Clause.

The scope of Ford's duty to the plaintiffs, the standard of conduct, was reasonable care. Whether Ford's failure to incorporate an airbag or other passive restraint system into the vehicle was unreasonable is a

question of fact. *Nichols v. Union Underwear Co., Inc.*, Ky., 602 S.W.2d 429, at 433 (1980).

SO ORDERED at Pikeville, Kentucky this 17 day of February, 1986.

HON. SILL T. SCOTT, JUDGE

Have Seen:
Daniel L. Hall
Attorney for Plaintiff
William D. Grubbs
Attorney for Ford
Motor Company

NELDA MUNSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MICHAEL DEAN MUNSON, DECEASED, AND TAMMI MUNSON, CONNIE MUNSON, AND MICHAEL KEITH MUNSON

VS.

DANIEL RICHARD PEARCY, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, AND UNIROYAL, INC. INDIVIDUALLY AND D/B/A UNIROYAL TIRE CO.

IN THE DISTRICT COURT OF ORANGE COUNTY, TEXAS
163RD JUDICIAL DISTRICT

JUDGMENT OVERRULING MOTION FOR SUMMARY JUDGMENT

On this date, came on to be heard the Motion of Defendant Ford Motor Company for Partial Summary Judgments in this cause. All parties appeared by and through their respective counsel. The Court, after ex-

amining the pleadings and the summary judgment evidence and hearing the arguments of counsel, is of the opinion and finds that Defendant Ford Motor Company is not entitled to summary judgment on either common law grounds or federal preemption and burden on commerce theories.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment by Defendant Ford Motor Company are in all things OVERRULED.

All relief requested and not expressly granted is denied.

Signed this 15th day of May, 1986.

David A. Dunn

Judge Presiding

Kenneth W. Lewis

TOWNSLEY, BUSH, LEWIS & RAMSEY, P.C.

3550 Fannin Street

Beaumont, Texas 77701

(409) 835-3521

FILED

BILLYE MINTER

Dist. Clerk, Orange Co., TX

May 15 1986

At 9:52 A.M.

BY Patricia Richard

Deputy

NO. 85-15718-C

PEGGY STEENBERGEN, INDIVIDUALLYAND ON BEHALF OF THE ESTATE OF JOSEPH RAY STEENBERGEN, DECEASED, AND JANET STEENBERGEN, AS NEXT FRIEND OF JENNY STEENBERGEN AND JANET STEENBERGEN, MINORS	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 68TH JUDICIAL DISTRICT

VS.

FORD MOTOR COMPANY AND PATTON-WRIGHT FORD SALES, INC.

ORDER

Came on to be heard the 26th day of June, 1986, Ford Motor Company's Motion for Summary Judgment, and the Court having before it Ford Motor Company's Brief in Support of the Motion for Summary Judgment and Affidavits and the Reply Briefs filed by Plaintiff, the Court having heard argument of counsel at a hearing on said date makes the following rulings:

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Ford Motor Company's Motion for Summary Judgment is denied at this time; however, Ford Motor Company is given leave to file a Motion for Reconsideration and supporting Briefs, and said Motion can be filed within twenty (20) days from the entry of this Order, or if Ford Motor Company desires an extension time for the filing of said Motion, it will be granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ford Motor Company may file, as part of its Motion for Reconsideration or

otherwise, affidavits or any other documents in support of its Motion for Reconsideration. After said Motion and Briefs and Affidavits and/or documentation have been filed, the Court will then set said Motion down for hearing and oral argument.

SIGNED this 30th day of April, 1986.

JUDGE PRESIDING

ORDER - Page Solo

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

MARLENE M. BATEMAN, Administratrix of the Estate of William J. Bateman, Deceased; and MARELENE M. BATEMAN, in her own right, Plaintiffs,

No. GD 84-4994

vs.

JOHN DEMSHER and RONALD DEMSHER, t/d/b/a THE WHEEL, RONADL C. LENHART and FORD MOTOR COMPANY, Defendants.

MEMORANDUM

Defendant, Ford Motor Company, (Ford) has filed, a motion for judgment on the pleadings or, in the alternative, for partial summary judgment seeking the dismissal of paragraph 30 b) of plaintiff's amended

complaint in this civil action arising out of the death of decedent, William J. Bateman, in an automobile collision on November 19, 1983. The amended complaint alleges, as to Ford, that the 1980 Mustang automobile operated by decedent was defective in that it was not a safe and crashworthy automobile and that defects in the automobile caused or contributed to decedent's death. Paragraph 30 b) of the amended complaint to which Ford's motion is directed states:

> Despite Ford's legal duty to design, manufacture and sell only safe vehicles, decedent's automobile was unsafe generally and defective, inter alia, in the following particulars: . . .
>
> b) absence of a passive restraint system such as airbags or similar safety devices . . .

With respect to the foregoing claim, Ford asserts that the absence of a passive restraint system may not, as a matter of law, form the basis of a finding that the Mustang was defective because the subject matter of passive restraints, and airbags, in particular, is preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. Sec. 1381—1431 (1966) and its implementing regulations.

The provisions of the National Traffic and Motor Vehicle Safety Act of 1966 which pertain to Ford's motion are Sections 1392(d) and 1397(c). These provide as follows:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle

> equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard
>
> . . .

15 U.S.C. Sec. 1392(d)

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. Sec. 1397(c)

After argument on the motion, the court concludes that the motion is premature and that the questions it raises should be deferred until the time of trial when the factual and theoretical details of plaintiff's claims as to the alleged failure of Ford to provide an adequate restraint system are known and when the court can better determine whether the National Traffic and Motor Vehicle Safety Act of 1966 should bar the submission of such claims to the jury.

An order follows.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA
CIVIL DIVISION

MARLENE M. BATEMAN,
Administratrix of the Estate of
William J. Bateman, Deceased;
and MARLENE M. BATEMAN, in
her own right, Plaintiffs,

vs.

JOHN DEMSHER and RONALD
DEMSHER, t/d/b/a THE WHEEL,
RONADL C. LENHART and
FORD MOTOR COMPANY,
Defendants.

ORDER

AND NOW, this 18th day of June 1986, in accordance with the foregoing memorandum, it is hereby ORDERED that the motion of defendant, Ford Motor Company, for judgment on the pleadings or, in the alternative, for partial summary judgment, be, and hereby is, denied.

BY THE COURT:

HUNT, COLAW & ROE, INC.
613 Civic Center Drive West
Suite 300
Santa Ana, California 92701
(714) 558-9000

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

KELLY LYNN BURGE, et al,
Plaintiffs,
vs
RICHARD ALAN BLIGHT, et al,
Defendants.
AND RELATED CROSS ACTIONS.

No. 41 74 75
NOTICE OF RULING ON MOTION FOR SUMMARY ADJUDICATION

TO DEFENDANTS AND THEIR RESPECTIVE COUNSEL HEREIN:

PLEASE TAKE NOTICE that defendants AMERICAN HONDA MOTOR CO., INC., HONDA MOTOR CO., LTD., AND HONDA RESEARCH & DEVELOPMENT CO., LTD., Motion for Summary Adjudication came on regularly for hearing at 9:30 a.m., on June 30, 1987 in Department 21 of this Court, located at 700 Civic Center Drive West, Santa Ana, California. The Court, having read the submitted papers and heard argument of counsel, DENIED said motion for Summary Adjudication.

DATED: June 30, 1987

HUNT, COLAW & ROE, INC.
By
MARIO W. MAINERO, JR.
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN
AMD FOR LEE COUNTY, FLORIDA

CASE NO: 83-3931-CA

JAMES R. RUSSELL, etc., Plaintiffs,

vs.

WILLIAM EDWARD JOHNSON, II etc., et al., Defendants.

ORDER GRANTING IN PART AND DENYING IN PART FORD MOTOR COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on March 30, 1987 upon the Motion for Partial Summary Judgment of Defendant FORD MOTOR COMPANY dated August 29, 1986, and the Court having heard the arguments of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The Court rules as a matter of Florida Tort Law and public policy, that no cause of action will lie against a motor vehicle manufacturer for failure to install an airbag or other passive restraint device in a motor vehicle. To the extent that the Complaint in this action alleges any such cause of action, FORD MOTOR COMPANY'S Motion for Partial Summary Judgment dismissing that cause of action is Granted.

2. To the extent, however, that the Complaint does not claim that the subject motor vehicle was defective for the sole reason that an airbag or other passive restraint device was not present in the vehicle, but instead claims that the hood of the vehicle was defective, that FORD MOTOR COMPANY knew or reasonably should have known of the hood defect and failed to protect the Plaintiff LISA RUSSELL from injury due to the hood defect by one or more design alternatives, including airbags, FORD MOTOR COMPANY'S Motion for Partial Summary Judgment under Florida Tort Law is Denied.

DONE AND ORDERED in Chambers at Ft. Myers, Lee County, Florida this 28 day of Apr., 1987.

BEST AVAILABLE COPY

HONORABLE WILLIAM J. NELSON
Lee County Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing Order has been furnished this 28 day of Apr., 1987 by U.S. Mail to: RONALD E. CABANISS, ESQUIRE, Post Office Box 1873, Orlando, Florida 32802; PETER J. YANOWITCH, ESQUIRE, 700 COncord Building, 66 West Flagler, Miami, Florida 33130; J. TERRANCE PORTER, ESQUIRE, Post Office Box 280, Ft. Myers, Florida 33902; and JOSEPH LINNEHAN, ESQUIRE, Post Office Box 1567, Ft. Myers, Florida 33902.

Marcia Garrett
SECRETARY TO JUDGE NELSON

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL ACTION

JAMES R. RUSSELL, JR., et al Plaintiffs,

vs.

WILLIAM EDWARD JOHNSON, II, et al
Defendants

ORDER

THIS CAUSE came on to be heard upon Defendant, FORD MOTOR COMPANY'S motion for partial summary judgment. Earlier in this case the Court heard and ruled upon a motion for partial summary judgment

which dealt with a "pure air bag" claim. On April 20, 1987, this Court ruled as a matter of law that a cause of action will not lie in the State of Florida for failure of an automobile manufacturer to install passive restraints.

This Court also ruled that a cause of action would lie where it is alleged that Defendant, FORD MOTOR COMPANY knew or should have known about a defective hood and failed to take steps to protect the Plaintiff, which might include passive restraints.

Defendant, FORD MOTOR COMPANY, now argues at great length that all of this is pre-empted by federal law and Plaintiff cannot argue passive restraints in any way. I do not agree with this contention.

I have read the memoranda submitted and as many of the cases as I could stand. These cases contain a far better analysis of this problem than I could ever give. My reading and understanding of the cases lead me to the conclusion that my ruling on April 28, 1987, was then and is now correct and the issues as framed by that ruling are not pre-empted by federal law.

Defendant, FORD MOTOR COMPANY'S motion for partial summary judgment filed May 19, 1987, is denied.

DONE AND ORDERED this 17 day of July, 198

William J. Nelson,
Circuit Judge

cc: All Counsel
0587N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
LARRY GARRETT, et al., Plaintiffs
v.

FORD MOTOR COMPANY, et al. Defendants

MEMORANDUM AND ORDER

Plaintiffs have brought this diversity action against defendant Ford for personal injury and wrongful death based upon negligence, breach of warranty and strict liability in tort.

On August 29, 1985, James S. Garrett and Christopher B. Gaboury were rear seat passengers in a 1985 Ford Escort. The car, driven by Christina Kisamore, collided head on with a tractor trailer truck. At the time of the collision, both Garrett and Gaboury were wearing the lap seat blets which came as standard equipment in the rear seat of the Escort.

Garrett and Gaboury each suffered sever abdominal injuries allegedly caused by the lap belts they were using at the time of the accident. Gaboury died approximately five hours after the accident and Garrett is paralyzed from the waist down.

Pending before the Court is defendant Ford's motion for judgment on the pleadings, or in the alternative, a motion for summary judgment.

I.

Ford's motion presents this Court with a problem of statutory construction involving the National Traffic and Motor Vehicle Safety Act of 1966 (the Act). Pub. L. No. 89-563, 80 Stat. 718 (now codified at 15 U.S.C. §§ 1381-1431). The Act stands as a comprehensive federal regulatory scheme contemplating detailed performance and safety standards for particular motor vehicle equipment. This legislation reflected a conviction to reduce traffic accidents and the deaths, injuries, and property damage which occur in such accidents. S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709. Secondarily, the centralized, mass production, high volume character of the motor vehicle industry in the United States created the subsidiary purpose

of establishing uniform national safety standards for motor vehicles and motor vehicle equipment. *Id.* at 2720.

The safety standard involved in this case is Congress' 1974 amendment ot the Act which addresses regulatory standards for occupant restraint systems. That amendment provides that:

> Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may—
>
> (A) have the effect of requiring, or
>
> (b) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.

15 U.S.C. § 1410b(2).

An occupant restraint system is defined as a "system the principle purpose of which is to assure that occupants of a motor vehicle remain in their seats in the event of a collision or rollover." 15 U.S. C. § 1410b(f)(3). More importantly, the term "belt" system is "an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants." 15 U.S.C. 1410b(f)(2).

Ford claims to have conformed with this safety standard in manufacturing the Escort, and contends that compliance with the federal standard preempts plaintiff's common law claims. Principally, defendants rely upon the supremacy clause contained in the Act which provides in part that:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be

> construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

15 U.S.C. § 1392(d).

Plaintiffs, on the other hand, point the section of the Act which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

II.

Because Ford's preemption argument has convinced other District Courts, this Court will consider it in some detail.

Ford argues that preemption can occur in several ways.

> First, when enacting a federal statute, Congress may expressly state an intent to preempt state law. Second, even absent express preemptive language, Congress may otherwise indicate its intention to preempt state law by legislating so comprehensively that it has "left no room for the States to supplement federal law." Third, even absent an express or implied Congressional intent to preempt state law, state law will be preempted if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

(citations omitted). This court finds none of the three preemption arguments to be persuasive.[1]

Ford's first argument in favor of express preemption is undercut by Congress' explicit provision allowing for common law liability in the savings clause. If Congress had intended to expressly preempt state law it presumably would have done so; it certainly would not have included the savings clause.

Next, it is clear that Congress did not intend to legislate comprehensively and occupy the entire field of motor vehicle safety as Ford's second argument suggests. Not only did Congress expressly permit identi-

cal regulation, 15 U.S.C. § 1392(d), but the states may also regulate areas not specifically addressed by Congress, *Chrysler Corp. V. Rhodes*, 416 F.2d 319, 323 (1st Cir. 1969).

Ford's third preemption argument also fails. The expressly declared purpose of the Act was to reduce deaths and injuries resulting from traffic accidents, 15 U.S.C. § 1391. Ford contends that Congress' purpose for the Act was to create uniformity in safety standards. While this was one of Congress' incidental concerns, it was not the primary one. Congress intended the Act to save the lives of automobile passengers through safety standards; not the dollars of automobile manufacturers [1] This Court's rejection of Fords' preemption claims follows the similar reasoning contained in *Wood v. General Motors*, No. 85-3591, (D. Mass. May 9, 1987).
through uniformity.

Defendant also has an additional problem; namely, the plain language of the supremacy clause contained in the Act. The clause specifically prohibits a state or a political subdivision of a state from establishing standards which conflict with the federal standards. The language does not, on its face, indicate any Congressional intent to preempt a common law claim.

Such a construction, that a common law claim is not state regulation, according to Ford, "plainly contradicts Supreme Court opinions." Furthermore, "numerous Supreme Court opinions hold . . . that state court decisions and jury awards are no less state action than acts of the state legislature or executive branches." Ford, however, in its briefs only supports its position by citing two cases.

The first case, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), involves the National Labor Relations Act. The Supreme Court has articulated that different standards are involved to preserve the N.L.R.B's jurisdiction, *see Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984) (even when the state law regulates conduct only arguably protected by

federal law, a *presumption of preemption applies*). The second case is *Sears, Roebuck & Co., v. Stiffel Co.*, 376 U.S. 225 (1964). *Sears*, however, dealt with the preemption of an Illinois unfair competition law, not the preemption of a common law claim which is involved in the present case. *Id.* at 225. It is undisputed that the Act's supremacy clause would preempt a state legislature from enforcing laws which are not consistent with those contained in the Act.

Finally, Ford contends that three very recent cases control the disposition of the motion.

This Court disagrees with the reasoning in the first case cited by Ford, *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095 (E.D. Mo. 1986). *Vanover* relies on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), to establish the proposition that a common law claim can be preempted by the supremacy clause of the Act, 632 F.Supp. at 1096. *Garmon* involved a presumption of preemption which does not occur in the present case. In a case involving the N.L.R.B., like *Garmon*, even when the state law regulates conduct only arguably protected by federal law, a presumption of preemption applies. *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. at 502. Without first establishing this crucial proposition, a conclusion of preemption cannot be reached.

Next, Ford cites *Cox. v. Baltimore County*, 646 F.Supp. 671 (D. Md. 1986). Judge Motz held that "there is nothing in the language of the Safety Act or its legislative history to suggest that the term 'safety standard' is intended to encompass only standards adopted by a regulatory body." *Id.* at 763. Judge Motz inferred from this lack of language that a common law claim can be a regulatory standard and therefore preempted. Preemption however, cannot be based on the lack of language. This inference is contrary to the savings clause which explicitly preserves all common law claims.

The Court then goes on to hold that a common law claim which permits the recovery of damages for its breach sets a standard of regula-

tion, 646 FSupp. at 763. To support this proposition, Judge Motz cited *San Diego Building Council v. Garmon*, 359 U.S. 236 (1959). As previously discussed, *Garmon* involved the National Labor Relations Board, and the Supreme Court has held that a different, higher standard is involved which includes a presumption of preemption. The cases at hand is controlled by just the opposite presumption — against preemption — that "Congress did not intend to displace State law", *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

In addition, the Court in *Cox* found a "significant subsidiary purpose [of the Act] . . . to create uniform motor vehicle standards", 646 FSupp. at 764. In order to avoid a conflict with this subsidiary purpose, the Court concluded that a common law claim must be preempted. As previously noted, uniformity was only a secondary purpose to the primary goal of safety. Congress was concerned with safety; not the automobile industry's concern with uniformity.

Doty v. McMahon, No. 95-3591 (D.D.C. Feb. 4, 1987) is the third case Ford cites to support its position. The Court in *Doty* based its decision of preemption on the fact that Congress had legislated comprehensively in the area of motor vehicle safety and there was no room for the states to supplement the legislation. *Id.* at 5. This Court disagrees with the reasoning in *Doty*. Congress has permitted identical regulation, 15 U.S.C. § 1392(d), as well as allowing states to regulate areas not specifically addressed by Congress, *Chrysler Corp. v. Rhodes*, 416 F.2d 119 (1st Cir. 1969).

The Court in *Doty* continued that "Congress has expressed an intent to prohibit any state motor vehicle safety standard that is not identical to the Federal Motor Vehicle Safety Standard governing the same vehicle feature", No. 85-3591 slip op. at 6. To support this proposition, the Court relied on *Cox* and *Vanover*, the reasoning of which has been already discussed above.

What Ford is left with, therefore, is the plain language of the Act.

III.

The main purpose of the Act is expressed in 15 U.S.C. § 1381, which states:

> Congressional declaration of purpose
>
> Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce.

The motor vehicle safety standards which are established apply to:

> "any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highway, except any vehicle operated exclusively on a rail or rails."

15 U.S.C. § 1392(3). Because of the general nature of these standards, which apply to all automobiles, Congress considered the safety standards only to be a "*minimum standard* for motor vehicle performance or motor vehicle equipment performance . . . " 15 U.S.C. § 1391(2) (emphasis added)

The preemption clause upon which Ford relies was intended to prevent the states from legislating other minimum safety standards for manufacture. S. Rep. No. 1301, 99th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News at 2709. Or, on the other hand, to prevent the State legislation of higher standards. *Id.* The statute removes authority to establish, or continue in effect a safety standard which is not identical to the federal standard. 15 U.S.C. § 1392(d).

Because the safety standards were only intended to be minimum standards, Congress has no intention to preempt common law liability. To this end it enacted the savings clause which allows for a tort claim even if the minimal standards are met. Furthermore, because the standards are minimum, and applicable to all automobiles, nothing preempts

a jury from returning a verdict that a manufacturer was negligent in regard to a particular element of a particular car. "Thus, common-law courts of the states, may hold that the safety performance requirements of a Federal standard are so 'minimum' that, under the particular circumstances of the case, the manufacturer's failure to exceed it imposes liability", H. Heffron, R. Medalie, S. Kurzman & M. Pearlman, *Federal Consumer Safety Legislation*, 1x at 23 (1970)[2]

This is not to say that compliance is entirely irrelevant. Compliance with the Act may be admissible on the issue of care, but it does not create an absolute defense or require that a jury find a defendant's conduct reasonable. *Dorsey v. Honda Motor Car*, 655 F.2d 650, 656 (5th Cir. 1961), *cert denied*, 459 U.S. 880 (1982). The case at hand is such a case in which Ford's failure to exceed the legislature's minimal safety requirements may impose liability.

This decision is also supported by the general development of products liability law. Indeed, in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cr. 1969), a seminal automobile products liability case, the Court discussed some of the concerns behind allowing common law claims. The court held it was apparent that:

> the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile or rigid and serves the best interest of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability.

Id at 506.

This Court holds that the most reasonable way to reconcile the language of the National Motor Vehicle Traffic Safety Act does not preempt

plaintiffs' common law claims. Therefore, there still remains a triable issue of material fact.

Accordingly, it is this 2nd day of August, 1987, by the United States District Court for the District of Maryland,

ORDERED:

1. that the motion for judgment on the pleadings or for partial summary judgment submitted on behalf of defendant, Ford, BE, and the same hereby IS, DENIED; and

2. that the clerk mail copies of this Memorandum and Order to the counsel of record.

Joseph C. Howard
United States District Judge

[2] This is a special report prepared for the National Commission on Product Safety which studied the scope and adequacy of several safety statues, including the National Motor Vehicle Safety Act.

WFC/nfc 10/12/87

CAUSE NO. 85-6068-B

MR. AND MRS. JOE SALINAS, INDIVIDUALLY, AND AS NEXT FRIENDS OF MARTHA LOREEN SALINAS, AND MICHAEL JOSEPH SALINAS, A MINOR, AND LINDA JO SALINAS	IN THE DISTRICT COURT 117TH JUDICIAL DISTRICT

VS.

TAMMY DIANE YARBOROUGH,
NEIL ROEFARO, GEORGE
YOUNG TOYOTA, TOYOTA MO-
TOR SALES, U.S.A., INC. AND
TOYOTA MOTOR CORPORATION

ORDER DENYING DEFENDANTS, TOYOTA MOTOR SALES, U.S.A., INC., AND TOYOTA MOTOR CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On this 12th day of October, 1987, came on to be heard Defendants, Toyota Motor Sales, U.S.A., Inc., and Toyota Motor Corporation's Motion for Partial Summary Judgment based on purported express and implied preemption of Plaintiffs' "passive restraint claim" by the National Traffic and Motor Vehicle Safety Act, Federal Motor Vehicle Safety Standard 208, and 15 U.S.C. Section 1410b, and the Court after reviewing the briefs submitted by counsel and hearing argument regarding the same, is of the opinion that said motion should be and is hereby denied.

Signed this 13 day of October, 1987.

DISTRICT JUDGE

IN THE SUPERIOR COURT
FOR THE COUNTY OF BLECKLEY
STATE OF GEORGIA

TAMMY KIMBREL, By Next Friend and Natural Guardian Margaret D. Kimbrel, MARGARET D. KIMBREL, Individually, and KENNETH K. KIMBREL, Plaintiffs,

v.

ROBERT LYNN JONES; HONDA MOTOR CO., LTD.; AMERICAN HONDA MOTOR CO., INC.; AND HONDA RESEARCH & DEVELOPMENT LTD., Defendants.

CIVIL ACTION NO. 85V-009

MOTION FOR SUMMARY JUDGEMENT ON BEHALF OF DEFENDANTS HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC., AND HONDA RESEARCH & DEVELOPMENT LTD.

COME NOW defendants Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda Research & Development Ltd. (hereinafter referred to collectively as "Honda defendants") and move the Court pursuant to O.C.G.A. §9-11-56 to enter summary judgment in their favor in the above-styled case. This motion is based upon the entire record in this case, including the depositions of the plaintiffs. The motion and the grounds therefore are fully discussed in defendants' brief in support of the motion, field herewith. Pursuant to the Uniform Superior Court Rules, defendants' statement of theories of recovery and of material facts as to which there are no genuine issues for trial, is filed herewith.

RESPECTFULLY SUBMITTED, this 22nd day of December, 1986.

DICKEY, WELCHEL, BROWN & READDICK
Richard A. Brown, Jr.
John E. Bumgartner

P.O. Box 220
Brunswick, GA 31521
(912) 264-5844

IN THE SUPERIOR COURT
FOR THE COUNTY OF BLECKLEY
STATE OF GEORGIA

TAMMY KIMBREL, By Next Friend and Natural Guardian Margaret D. Kimbrel, MARGARET D. KIMBREL, Individually, and KENNETH K. KIMBREL, Plaintiffs,

CIVIL ACTION NO. 85V-009

v.

ROBERT LYNN JONES; HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC.; AND HONDA RESEARCH & DEVELOPMENT LTD.,

Defendants.

STATEMENT OF THEORIES OF RECOVERY AND OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE FOR TRIAL

COME NOW the Honda Defendants pursuant to the Uniform Superior Court Rules and in conjunction with their motion for summary judgment file this their statement of theories of recovery and of material facts as to which there is no genuine issue for trial as follows.

THEORIES OF RECOVERY

1. Plaintiffs' theory of recovery that the failure of the Honda Defendants to equip the vehicle in question with airbags or other passive restraints renders the vehicle defective or constitutes negligent design or provides any other basis for the imposition of liability upon the Honda Defendants.

STATEMENT OF FACTS

1. The sole basis upon which the plaintiffs seek to impose liability upon the Honda Defendants in this case is the fact that the automobile in question was not equipped with "passive occupant protection."
2. It is undisputed by the plaintiffs that the Honda automobile in question was equipped with three-point lap and shoulder belts together with an audible buzzer, the function of which was to remind occupants to fasten their lap and shoulder belts.
3. None of the plaintiffs were under the impression that the Honda Accord in question was equipped with airbags or with any other passive restraint system and each of the plaintiffs has testified that they have never seen a car equipped with airbags.
4. Neither Plaintiff Tammy Kimbrel or Plaintiff Margaret Kimbrel were wearing their lap and shoulder belts at the time of the accident in question and it was their custom *not* to utilize that safety equipment, at least prior to the accident involved in this case.
5. The Honda Accord automobile in question was purchased used by Mr. Kimbrel.
6. The 1981 Honda Accord automobile at issue in this case fully complied with the safety standards of the National Highway Traffic Safety Administration which were in effect at the time when the car was manufactured.
7. Plaintiffs were fully aware that the car was not equipped with airbags or with any other kind of passive restraint system and the fact that the

vehicle was not so equipped was an obvious characteristic of the vehicle which created no hidden peril and did not prevent the vehicle from functioning properly for the purpose for which it was designed.

8. The vehicle in question was resonably suited for its intended purpose and it was safe for normal handling and use.

9. Colliding the vehicle in question with the rear of another vehicle represents abnormal handling.

10. The automobile in question was merchantable and reasonably suited to the use intended.

CONCLUSIONS OF LAW

1. The failure of the Honda Defendants to equip the car in question with airbags or other passive restraints does not render the vehicle defective or constitute negligent design and does not provide any basis for the imposition of liability upon the Honda Defendants.

2. Under Georgia law the failure of a manufacturer to install a certain item of safety equipment into its product cannot render the manufacturer liable where the absence of the safety feature is an obvious characteristic of the product which creates no hidden peril and does not prevent the product from functioning properly for the purpose for which it was designed.

3. Under Georgia law a manufacturer does not have the status of an insurer as respects product design and the manufacturer has no duty to design its product so as to render it wholly incapable of producing an injury.

4. A product is not defective under Georgia law when it is safe for normal handlig and consumption and use. Under Georgia law, with regard to allegations of design defects and negligent design there is no real difference between a claim for recovery under strict liability and a claim for recovery under negligence standards because the Courts have held that the standard to be applied in determining whether a design is defec-

tive thereby entitling a recovery under strict liability, is the traditional one of reasonable care.

5. Under Georgia law, where a plaintiff is aware of the condition of the product which he or she alleges constitutes a defect, the manufacturer has a complete defense to any claim by the plaintiff that he or she was injured as a result of the known condition.

6. Under Georgia law in order for strict liability to obtain the property in question must have been sold as new property and the strict liability statute applies only to new products and not to used products.

7. Since the allegations made by the plaintiffs against the Honda Defendants in this case involve matters which are clearly identical with the contemplated scope of the applicable regulations in effect at the time when the automobile in question was manufactured, prescribing the safety equipment to be installed in the vehicle, and since the Honda Defendants fully complied with the pertinent regulations in effect at the time when the vehicle was manufactured, the Honda Defendants did their duty by complying with the regulations and nothing more is required.

8. Where a defendant complies with regulations directly covering the claimed defect, compliance with such regulations is controlling.

9. A ruling by this Court that the lack of a passive occupant reatraint system rendered the vehicle in question defective would in effect render virtually every motor vehicle on the road today defective under Georgia law and would effectively transform automobile manufacturers into insurers, contrary to Georgia law.

10. The claims asserted by the plaintiffs against the Honda Defendants are pre-empted by the National Traffic and Motor Vehicle Safety Act.

RESPECTFULLY SUBMITTED, THIS 28 day of December, 1986.

DICKEY, WHELCHEL, BROWN
& READDICK
Richard A. Brown, Jr.
John E. Bumgartner
Attorneys for Honda Defendants

P.O. Box 220
Brunswick, GA 31521
(912) 264-8544

GEORGIA, GLYNN COUNTY

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing pleading by addressing same to:

Gerry E. Holmes, Esquire
Mundy & Gammage, P.C.
P.O. Box 930
Cedartown, GA 30125

Joseph H. Chambless, Esquire
Mary Mandel Katz, Esquire
Harris, Watkins, David & Chambless
P.O. Box 246
Macon, GA 31298-5399

and depositing same in the United States Mail with sufficient postage affixed to assure delivery.

This the 22nd day of December, 1986.

John E. Bumgartner
DICKEY, WHELCHEL, BROWN & READDICK
P.O. BOX 220
Brunswick, Georgia 31521

912/264-8544

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA GENERAL JURISDICTION DIVISION CASE NO. 1 85-33951-CA-07 HANSEL R. PHILLIPS., JR., et al., Plaintiffs,

vs.

JAMIE NAMIE, et al., Defendants.

PARTIAL SUMMARY FINAL JUDGMENT

Defendant, GENERAL MOTORS CORPORATION'S ("GM") Motion for Partial Summary Judgment on Plaintiffs' claims that the subject vehicle was defective because it was not equipped with air bags or other passive restraints came on for hearing on September 19, 1986.

Upon consideration of the pleadings and papers submitted by the parties and the oral argument of counsel, the Court makes the following findings and order:

1. Plaintiffs' claim that the subject vehicle was defective because it did not contain air bags or other passive restraints does not state a cause of action under Florida law.

2. Plaintiffs' claim that the subject vehicle was defective because it did not contain air bags or other passive restraints is preempted by federal law.

IT IS HEREBY ORDERED that Defendant, GENERAL MOTORS CORPORATION'S, Motion for Partial Summary Judgment be and is GRANTED.

Dated this 22nd day of September, 1986.

JOHN GALE

CIRCUIT COURT JUDGE

Conformed copies to:
Henry T. Courtney, Esquire
Mr. Jamie Namie
Mr. Joseph Canino
David C. Miller, Esquire
Robert J. Rudock, Esquire
J. Richard Caldwell, Jr., Esquire

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

SECOND JUDICIAL DISTRICT

STANLEY L. SOBOSCIENSKI;
MARCELLA ANN KELLER; and
COLUMBUS L. SOBOSCIENSKI,
Plaintiffs,

FILED in the Trail Courts
State of Alaska, Second District
OCT 18 1986
No. 2NO-85-246 Civil

vs.

FORD MOTOR COMPANY,
Defendant.

FINAL JUDGMENT BASED ON MOTION FOR SUMMARY JUDGMENT

Defendant Ford Motor Company has properly brought a Motion for Summary Judgment in conformity with Alaska Civil Rule 56. This suit is based upon a single vehicle accident that occurred on August 27, 1983,

when a 1982 vehicle manufactured by defendant Ford Motor Company and driven by Valerie Soboscienski went out of control and went off the roadway resulting in the death of Valerie Soboscienski. The sole claim of the plaintiffs against defendant Ford Motor Company is that the subject vehicle was defective in that it did not contain an airbag system. Defendant Ford Motor Company's Motion for Summary Judgment properly cites the law supporting their claim that plaintiffs' airbag theory is preempted by Federal Law. 15 U.S.C. §1392(d) on its face preempts plaintiffs' attempt to create an airbag requirement under the Tort Law of the State of Alaska. Therefore, it is hereby ORDERED, ADJUDGED AND DECREED that defendant Ford Motor Company's Motion for Summary Judgment is GRANTED

DATED at Anchorage, Alaska, this 28th day of October

JUDGE OF THE SUPERIOR COURT

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Douglas W. Seitz
Suzanne McCann
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(602) 257-7385
Attorneys for Defendant
Ford Motor Company

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FREDDIE VASQUEZ and NYRA H. VASQUEZ, conservators of the estate of FREDDIE VASQUEZ, JR., a minor, Plaintiffs,

v.

FORD MOTOR COMPANY, a Delaware corporation, Defendant.

No. CIV 86-0657 PHX WPC

ORDER

Having considered Defendant Ford Motor Company's Motion for Judgment on the Pleadings or, Alternately, for Partial Summary Judgment (Preemption), the Statement of Facts and Memoranda filed in sup-

port thereof and in opposition thereto, and having heard and considered the arguments of counsel, the Court finds that the Defendant is entitled to partial summary judgment, as a matter of law, on Plaintiffs' claim that the 1977 Ford F-100 pickup truck was defective because it did not contain an airbag. This Court finds that this claim for relief is expressly preempted by 15 U.S.C. § 1392(d) and is impliedly preempted by the policies and purposes of the National Traffic and Motor Vehicle Safety Act of 1966, the policies and purposes of 15 U.S.C. § 1410(b), the policies and purposes of Federal Motor Vehicle Safety Standard No. 208 in its current version and earlier relevant version, and the policies and purposes of Public Law Nos. 95-335 and 96-131. Plaintiffs' airbag claim is not preserved by 15 U.S.C. § 1397(c). *See Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986).

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Ford Motor Company's Motion for Partial Judgment on the Pleadings or, Alternatively, for Partial Summary Judgment (Preemption) is hereby granted as to Plaintiffs' claim that the 1977 Ford F-100 pickup truck was defective because it did not contain an airbag.

ORDERED this 2 day of Nov., 1986.

JUDGE OF THE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FREDDIE VASQUEZ and NYRA H. VASQUEZ, conservators of the Estate of FREDDIE VASQUEZ, JR., a minor, Plaintiffs,

NO. CIV 86-0657 PHX WPC

v.

FORD MOTOR COMPANY, a Delaware corporation, Defendant

ORDER

The Court having considered plaintiffs' Motion for Reconsideration, plaintiffs' Motion for Rule 54(b) or, Alternatively, Rule 1292(b) Judgment and plaintiffs' Motion for Stay Order, having read the memoranda filed in support thereof and in opposition thereto, and having heard the arguments of counsel, the Court determines that the principal case relied upon by plaintiffs in support of their Motion for Reconsideration, *Murphy v. Nissan Motor Corporation U.S.A.*, No. 84-CV-4556 (E.D.N.Y. filed January 13, 1987), is aberrational and contrary to the weight of authority supporting preemption. *See, Vanover v. Ford Motor Company*, 632 F. Supp. 1095 (E.D.Mo. 1986); *Cox v. Ford Motor Company*, 646 F. Supp. 747 (D.Md. 1986); *cf International Paper v. Ouelette*, 55 U.S.L.W. 4138 (U.S. Jan. 21, 1987); *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 45 U.S. 311 (1981). Consequently, the Court re-affirms its November 18, 1986 order in which it found that plaintiffs' claim that the 1977 Ford F-250 pickup truck involved in this matter was defective because it did not contain an air bag is expressly and impliedly preempted and denies each of plaintiffs' Motions.

William P. Copple

United States District Court Judge

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ATTORNEYS FOR Defendant,
General Motors Corporation

PHYLLIS PUZIO and JOSEPH PUZIO, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY
vs.	LAW DIVISION - BERGEN COUNTY
	DOCKET NO.: L-072325-85
GENERAL MOTORS CORPORATION, Defendant.	Civil Action
	ORDER GRANTING DEFENDANT GENERAL MOTORS CORPORATION'S NOTICE OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

THIS MATTER having come before the Court upon the application of Carpenter, Bennett & Morrissey, attorneys for defendant, General Motors Corporation, for an order dismissing plaintiffs' complaint pursuant to Rule 4:6-2(e) and the Court having considered the papers submitted in connection therewith and the arguments of counsel, and good cause appearing therefor,

IT IS on this 27th day of March, 1987,

ORDERED that defendant General Motors Corporation's motion to dismiss plaintiffs' complaint pursuant to Rule 4:6-2(e) be and the same is hereby granted.

ROBERT E. HAMER
J.S.C.

ORDERED THAT A COPY OF THIS
ORDER IS TO BE SERVED UPON ALL
COUNSEL WITHIN 7 DAYS OF THE
DATE HEREOF.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CLIFFORD DONNELLY and LOIS WILMA DONNELLY, Plaintiffs,

V.

GENERAL MOTORS CORPORATION, et al, Defendants

Civil No. 86-576JU

ORDER

BURL GREEN
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International Bible Students Association.

MARSH, Judge

Magistrate George E. Juba filed his Findings and Recommendation on June 22, 1987. The matter is now before me. *See* 28 U.S.C. §636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the record *de novo* review. *Lorin Corp. v. Goto & Co., Ltd.*, 700 F.2d 1202, 1206 (8th Cir. 1983). *See also Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983). I find no error.

Accordingly, I ADOPT the Findings and Recommendation that plaintiffs' claims are preempted by the National Traffic and Motor Vehicle

Safety Act and that Defendant General Motors' motion for summary judgment 33 should be granted.

IT IS SO ORDERED.

DATED this 31 day of July, 1987.

MALCOLM F. MARSH
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CLIFFORD DONNELLY and LOIS WILMA DONNELLY, Plaintiffs,

Civil No. 86-576-JU

v.

GENERAL MOTORS CORPORATION, et al, Defendants.

FINDINGS AND RECOMMENDATION

JUBA, Magistrate:

This is a diversity action arising out of an automobile accident. Plaintiffs contend that defendant General Motors Corporation (GMC) was negligent in the design or manufacture of their 1984 Buick Regal Sedan. Plaintiffs also assert a claim for strict product liability. Both claims are premised on the defendant's asserted failure to install an adequate passive restraint system, including but not limited to airbags. GMC now moves for summary judgment on both claims as preempted by the Na-

tional Traffic and Motor Vehicle Safety Act and pursuant to Fed. R. Civ. P. 56. The motion should be granted.

LEGAL STANDARDS

Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Securities and Exchange Commission v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). It may meet this burden by showing that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 106 S. Ct. at 2554.

All reasonable doubts as to the existence of genuine issues must be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Where different ultimate inferences can be drawn, summary judgment is inappropriate. *Sankovich v. Insurance Company of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

FACTUAL BACKGROUND

On September 4, 1984, plaintiffs were driving their 1984 Buick Regal Sedan, manufactured by defendant General Motors. Plaintiffs collided with defendant Jane Armenta's vehicle. The Buick was equipped with seat belts, but plaintiffs were not using them at the time of the accident. The Buick was equipped with three-point manual lap and shoulder belt. A three-point belt is an integrated lap and shoulder strap attached to the car at three points. 49 C.F.R. § 571.208. The Buick also had warnings, in-

cluding a dashboard light and buzzer, designed to encourage seat belt use. The restraint system met the requirements of the applicable regulation, the Federal Motor Vehicle Safety Standard 208 (FMVSS 208).

SUMMARY OF FEDERAL REGULATION OF PASSENGER RESTRAINT SYSTEMS

The following summary is taken in large part from the well-written opinion in *Hughes v. Ford Motor Co.*, Civ. No. H-84-1049 (PCD)(D. Conn. July 17, 1986).

In 1966 Congress determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle standards that were "strong and adequately enforced" and "uniform throughout the country." S. Rep. No. 1301, 89th Cong., 2nd Sess., reprinted in 1966 U.S. Code Cong. & Ad. Newd 2720 (1966). Congress concluded that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.*, at 2712.

Congress, therefore, enacted the National Traffic and Motor Vehicle Safety Act which required the Secretary of Transportation to create Federal Motor Vehicle Safety Standards (FMVSS) to "meet the need for motor vehicle safety." 15 U.S.C. § 1392(a). "Motor vehicle safety" is statutorily defined as that degree of protection necessary to protect the motoring public:

> against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and . . . unreasonable risk of death or injury to persons in the event accidents do occur. . . .

15 U.S.C. § 1391(1). The Secretary is required, in promulgating any FMVSS, to consider what is "reasonable, practicable and appropriate." 15 U.S.C. § 1392(f)(3).

The next year, the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT) adopted FMVSS 208, which required the installation of seat belts. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). In 1968, the NHTSA published an advance notice of proposed rulemaking, which requested information on "passive occupant restraint systems." The two major passive restraint systems are automatic seat belts and air bags. 49 C.F.R. 28962, 18965 (July 17, 1984). NHTSA amended FMVSS 208 in November 1970 to require the installation of passive restraints for front seat passengers, effective July 1, 1973 and for all other passengers, effective July 1, 1974. 35 Fed. Reg. 16927 (Nov. 3, 1970). Four months later, the NHSTA amended FMVSS 208 to postpone the effective dates until August 15, 1973 and August 15, 1975, respectively. 36 Fed. Reg. 4600 (Mar. 10, 1971). FMVSS 208 was further amended in 1972 so that with respect to front seat passengers, automobiles built between August 15, 1973 and August 15, 1975 could be equipped either with passive restraint systems or an ignition interlock system which would prevent the vehicle from starting if lap and shoulder belts were not utilized; by August 15, 1975, rear seat passengers also were to be protected by passive restraints. 37 Fed. Reg. 3911 (Feb. 24, 1982).

In 1974, Congress enacted 15 U.S.C. § 1401b(b)-(d) by which it prohibited the DOT from requiring airbags or other non-seat belt systems without special administrative proceedings and Congressional review. Thereafter, the DOT vacillated on its poisition regarding passive restraint systems. For example, in 1976 Secretary Coleman did not require airbags. 41 Fed. Reg. 24070 (June 14, 1976). The next year, however, his successor, Secretary Adams, required passive restraint systems commencing with the 1982 model year and phased in over a three-year period. 42 Fed. Reg. 34290, 34295 (July 5, 1977). This requirement, however, was rescinded in 1982 by Secretary Lewis, the NHSTA instead requiring detachable automatic belts. 46 Fed. Reg. 53419 (Oct. 29, 1981). The United States Supreme Court later found that such action had been

taken without the proper administrative procedures and thus reversed and remanded the matter for further administration consideration. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

Upon remand, the NHSTA conducted exhaustive hearings following which Secretary Dole promulgated the present FMVSS 208, 49 Fed. Reg. 28962 (July 17, 1984), now found in 49 C.F.R. § 571.208, §4.1.2 to § 4.1.5 (1985). This version requires automobiles to be equipped with three-point seat belts until September 1, 1986, when passive restraint systems become mandatory on a phase-in basis until September 1, 1989. *Id.*, at 29009-10, 18963. However, the passive restraint requirement will be rescinded if, by April 1, 1989, states with two-thirds of the United States population adopt mandatory seat belt laws. *Id.* at 29010, 28963, 28998.

The NHSTA articulated several reasons for not requiring airbags at the present time. Airbags provide no protection in non-frontal collisions, so that a lap belt or lap-shoulder belt is still necessary. *Id.* at 28984, 28986. The three-point seat belt, when worn, provides better protection than an airbag alone or an airbag in conjunction with a lapbelt. *Id.* at 28985. There are problems in using airbags in smaller automobiles, where the smaller leg room may impede inflation of the airbag. *Id.* at 28974, 28992, 29001. Airbags were not seen as cost effective, both in manufacture and in replacement situations. Airbags may cause injuries, particularly to children. *Id.* at 28992, 29001. The public fears airbags and may not accept them. *Id.*, 29001. Finally, Secretary Dole stated that "[B]y restricting the manufacturers [to airbags], the Department runs the risk of killing or seriously retarding the development of more effective, efficient occupant protection systems." *Id.*, at 29001-02.

The options available to a vehicle manufacturer when plaintiffs' Buick was built are the same as those available today. Manufacturers may comply with Standard 208 by utilizing one of the following options: (1) passive restraints for front and lateral crashes; (2) passive restraints for front crashes plus lap belts for side crashes and rollovers; or (3) man-

ual seat belts. Defendant General Motors chose the latter system for plaintiffs' vehicle.

PREEMPTION

Article VI, clause 2, of the United States Constitution requires that all conflicts between federal law and state law be resolved in favor of the federal law. The Supremacy Clause prohibits the enforcement of any state law that conflicts with the exercise of federal power. *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982).

Federal law may preempt state law in three different ways: (1) expressly; (2) by occupying the field; (3) to the extent state law conflicts with the accomplishment of Congress' purposes. *Michigan Canners & Freezers Assoc. v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984). The *Michigan Canners* Court said:

> First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'."

Michigan Canners, 467 U.S. at 469 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (9141). General Motors contends that federal law pre-empts plaintiffs' claim both expressly and because allowing plaintiffs' claim would constitute an obstacle to the accomplishment of Congress' full purpose.

A. Express Pre-Emption

Section 1392(d) of the Safety Act provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal Safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirment applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Section 1397(c) provides as follows:

> "Continuation of common law liability
>
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person form any liability under common law."

Section 1392(d) expressly pre-empts any state standard "with respect to any motor vehicle' not "identical" to a federal standard applicable to the "same aspect of performance of such vehicle or item of equipment." The statute takes from the States "any authority" to "establish" or "continue in effect any" standard not "identical" to an applicable federal standard. FMVSS 208 was in effect at the time plaintiffs' Buick was built. It specified the standard for "active and passive restraint systems," and permitted manufacturers to install seat belts. 49

C.F.R. § 571.208, §2, §4.1.2 (1983). An Oregon common law standard requiring airbags would be applicable to the "same aspect" of motor vehicle performance as is regulated by the federal standard, and would not be identical to the federal standard. Therefore, section 1392(d) applies, and expressly pre-empts plaintiffs' common law claim. In accord, *see*, *Vanover v. Ford* Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986); *Cox v. Baltimore Co.*, 646 F. Supp. 761 (D. Md. 1986); *Doty v. McMahon*, Prod. Liab. Rep. (CCH) ¶ 11,273 (D.D.C. 1987); *Hughes v. Ford Motor Co.*, No. H-84-1049 (D. Conn. Jan. 5, 1987); *Wattelet v. Toyota Motor Corp.*, . Civ.-86-054-GF (D. Mont. Apr. 27, 1987).

Plaintiffs argue that section 1392(d) was addressed to state regulatory standards, while secton 1397(c) was addressed to the common law. Essentially, plaintiffs contend that a jury determination of liability is not a state regulatory standard. This argument fails because a jury verdict is based upon the governing law. Allowing a claim to go to a jury necessarily implies that the claim is one for which recovery is possible. A jury verdict in this instance would be based upon a common law rule setting a standard of behavior in this State. I agree with those courts that have found that a common law rule "which permits the recovery of monetary damages for its breach self-evidently sets a standard," and constitute[s] a form of state regulation. *Cox*, 646 F. Supp. at 763; Baird v. General Motors Corp., 654 F. Supp at 32.

B. Pre-Emption By Conflict With the Act's Objectives

Even if plaintiffs' claim were not expressly pre-empted it would be pre-empted because such a rule would conflict with the objectives of the Safety Act. A state rule "conflicts" with federal law if it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Michigan Canners*, 467 U.S. at 469. Whether a state law stands as an obstacle to Congress' objectives does not turn on its purpose, but on its effect on the federal regulatory plan. *Perez v. Campbell*, 402 U.S. 637, 650-52 (1971).

Congress has expressly approved the right of an automobile manufacturer to choose one of the three options available for compliance with FMVSS 208. The Department of Transportation determined that permitting manufacturers to choose among options would "provide sufficient latitude for industry to develop the most effective [restraint] systems." 49 Fed. Reg. at 38997, 29001 (1984). "Restricting the manufacturers" to a single choice risked "killing or seriously retarding the development of more effective, efficient occupant protective systems." *Id.* at 28962, 28997, 29001. Because the imposition of liability for failure to install airbags would eliminate the choice granted by Congress, plaintiffs' claim must be dismissed as pre-empted for conflicting with the Congressional intent.

Plaintiffs' proposed rule would conflict with federal law in another way. A "state law which interferes with the exercise of . . . federally protected rights creates an actual conflict and is pre-empted." *Brown v. Hotel & Restaurant Employees & Bartenders Int. Union*, 468 U.S. 491, 501 (1984). The Supreme Court has made it clear that a state common law rule cannot prohibit the exercise of a federally granted option. *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982). Therefore the State of Oregon may not adopt a rule that operates to prohibit the exercise of the options by which a manufacturer may comply with FMVSS 208.

CONCLUSION

Defendant General Motor's motion for summary judgment (33) should be granted.

Dated this 22 day of June, 1987.

United States Magistrate

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GLORIA M. BASS, ET AL

V.

NO. SA-N-CA-279

GENERAL MOTORS
CORPORATION

UNITED STATES MAGISTRATE'S MEMORANDUM AND RECOMMENDATION

TO: Honorable William S. Sessions
Chief United States District Judge

The following findings and recommendations are submitted to the Court pursuant to Title 28 U.S.C. § 636(b)(1)(B) and Local Rules 1(d) and 4(b) of the Local Rules for the Assignment of Duties to United States Magistrates.

The matter before the Court is Defendant's Motion for Partial Summary Judgment, filed January 5, 1987.

Findings of Fact

1. By the above referenced cause Plaintiffs proceed against Defendant upon claims of negligence, strict liability, warranty and deceptive trade practices for the alleged injuries suffered by Gloria Bass when (1) her seat belt purportedly failed to lock into position following the impact that resulted when her vehicle left the roadway and struck a concrete

drainage ditch and (2) Defendant failed to equip her vehicle with a passive restraint system (airbag).

2. Plaintiffs' vehicle was equipped with a three point lap-shoulder belt system for the occupants of the front outboard seating positions.

3. Plaintiffs do not argue that said occupant restraint system failed to fully comply with the requirements of Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"), the primary federal standard applicable to motor vehicle restraint systems.

4. Defendant maintains that Plaintiffs' "no airbag" claim is expressly preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq* ("Safety Act").

5. Conversely, Plaintiffs claim that the Safety Acts savings clause, section 1397(c), permits common law relief via a "no airbag" claim.

Conclusions of Law

1. Pursuant to 15 U.S.C. § 1392(d) individual states are expressly barred from regulating any feature of vehicle performance already controlled by federal law. *See also* U.S. Const. art. VI, cl. 2.

2. At all times material hereto, the FMVSS 208 dictated that auto manufacturers install either manual safety belts or passive restraint systems.

3. Common-law liability is retained by the Safety Act, at 13 U.S.C. § 1397(c), but only insofar as such common law liability does not conflict with the Safety Act or constitute the establishment or enforcement of a non-identical state safety standard regarding an aspect of vehicle performance or item of equipment currently regulated by a federal standard. *Cox v. Baltimore County*, 646 FSup. 761 (D. M.D. 1986); *accord Vasquez v. Ford Motor Co.*, No. CIV 86-657 FMX WPC (D. Ariz. Nov. 4, 1985), *motion for reconsideration denied* 2/19/87.

Recommendation

Having carefully considered all the pleadings in this case along with all relevant authorities the undersigned respectfully recommends that

Defendant's motion for partial summary judgment be in all things granted.

ORDER CONCERNING SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this United States Magistrate's Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to 28 U.S.C. § 636(b)(1)(Supp. 1982) and Rule 4(b) of the Local Rules for the Assignment of Duties to United States Magistrates, any party who desires to object t this report must file written objections to the Memorandum and Recommendation within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive or general objectives. A party's failure to file such written objections to proposed findings and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court of those proposed findings and recommendations. *See generally United States v. Raddatz*, 447 U.S. 667, 673-676, 683 (1980); 28 U.S.C. § 636(b)(1)(Supp. 1982). Additionally, *any failure to file written objections to the proposed findings and recommendations contained in this Memorandum and Recommendation, within ten (10) days after being served with a copy, shall bar the aggrieved party from appealing the factual findings of the Magistrate that are accepted or adopted by the District Court, unless the party validly alleges grounds of plain error or manifest injustice. See Deloney v. Estelle*, 679 F.2d 372, 373 (5th Cir. 1982); *Nettles v. Wainwright*, 677 F.2d 404, 408-410 (5th Cir. 1982)(Unit B *en banc*.

SIGNED AND ENTERED this 23rd day of July, 1987.

JAMIE C. BOYD

United States Magistrate

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ERIE

MICHAEL D. GARDNER Plaintiff INDEX NO. H-72107

-VS-

HONDA MOTOR COMPANY, LTD.,
AMERICAN HONDA MOTOR
COMPANY,
DON DAVIS PONTIAC, INC.

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910 Niagara Frontier Building
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Attorney for Defendant Don Davis
Pontiac, Inc.

MEMORANDUM

WOLFGANG, J.

Defendants Honda Motor Company Ltd. and American Honda Motor Company have moved this Court for an Order pursuant to CPLR 3212 granting partial summary judgment in favor of the defendants, dismissing plaintiff's complaint to the extent it relies upon the absence of airbags, automatic seatbelts or other passive restraints. The defendants allege that those parts of plaintiff's complaint which rely upon the lack of airbags or other passive restraints are pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. §1381, et seq.) and that the defendants fully complied with the requirements of the applicable federal regulation; that being Federal Motor Vehicle Safety Standard 28 (FMVSS-208). The defense contends that FMVSS-208 in effect in 1979 prohibited the creation of a national airbag requirement without congressional clearance (15 U.S.C. §1410b).

Held in obeyance pending the decision of the Court on the instant Motuion for Partial Summary Judgment is a motion by the defendants to strike plaintiff's Notice for Discovery and Inspection which the defense has claimed is overly broad and requires the defendants to supply third party information.

As concerns defendants' motion for partial summary judgment, the Court has reviewed all of the applicable federal legislation and all case law cited by both the defendants in support of their motion and the plaintiff in opposition thereto. The cases cited by the defendants (*Cox* v

Baltimore County, 646 FSupp.76; *Vasquez* v *Ford Motor Company*, No. CIV 86-0657 - PHX-WPC (D. Arizona November 18, 1986), aff'd., No. CIV 86-0657 - PHX-WPC (D. Ariz. Feb. 19, 1987); and more recently *Wattelet* v *Toyota Motor Corp.* FSupp., No. CV-85-054-6F (D. Mont. 1987) are on point and firmly support defendant's position for dismissal of plaintiff's air bag claims on the ground of pre-emption. In light of these cases and 15 U.S.C. §1381 et seq., the arguments presented by plaintiff in opposition to the motion for partial summary judgment are without merit. Accordingly, the motion is granted in all respects.

As concerns the defendant's motion for a Protective Order relating to plaintiff's notice for discovery and inspection, this Court holds that, in light of the Court's ruling as to defendant's motion for partial summary judgment all requests concerning documentation relating to the use of airbags or other passive restraints is prohibited. To that extent, and to the extent that plaintiff seeks information with regard to vehicle models other than the 1979 Honda Accord model involved in the instant matter, the motion for a Protective Order pursuant to CPLR §3103 is granted.

Submit order.

J.S.C.

DATED: Buffalo, New York
August 26, 1987

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PAULINE W. KITTS, as Personal Representative of the Estate of WILLARD F. KITTS, Plaintiffs,

No. CIV 85-0967 JC

vs.

GENERAL MOTORS CORPORATION, a foreign corporation, Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGEMENT AND DIRECTING ENTRY OF FINAL JUDGMENT ON PLAINTIFF'S "AIR BAG" CLAIM

Defendant General Motors Corporation's Motion for Partial Summary Judgment on Plaintiff's claim that her 1982 Pontiac J-2000 should have been equipped with air bags came on for hearing before the Court on September 10, 1987. Upon consideration of the pleadings, briefs and the oral arguments of counsel, the Court finds:

1. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1381, et seq. ("Safety Act") and regulations promulgated thereunder were intended by Congress to preempt any non-identical state standards, whether established through the application of common law principles of liability or otherwise, as to any federally regulated aspect of vehicle performance. 15 U.S.C. §1392(d). Accordingly, Plaintiff's air bag

claim is preempted by 15 U.S.C. §1392(d) and is not saved by 13 U.S.C. §1397(c). E.g., Donnelly v. General Motors Corp., No. 86-576-JU, District Court of Oregon, August 30, 1987 (adopting Magistrates rulings of June 22, 1987; Vanover v. Ford Motor Co., 632 FSupp. 1095 (E.D. Mo. 1986). Moreover, Plaintiff's air bag claim, if permitted, would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Safety Act and Federal Motor Vehicle Safety Standard 208, and is preempted for this reason as well. E.g., Baird v. General Motors Corp., 654 FSupp., 28 (N.D. Ohio 1986); Wattelet v. Toyota Motor Corp., (D. Mont. April 27 1987); Wickstrom v. Maplewood Toyota, Inc., Consumer Prod. Safety Guide (CCH) Para. 75,377 at 61,265 (Minn. Dist. Ct. March 12, 1987).

2. Defendant General Motors Corporation had no duty under New Mexico law to equiop the subject vehicle with air bags. Accordingly, Plaintiff's air bag claim does not state a cause of action under New Mexico law.

3. There is no just reason for delay in entering a final judgment dismissing Plaintiff's "air bag" claim.

IT IS THEREFORE ORDERED that Defendant General Motors Corporation's Motion for Partial Summary Judgement be, and it hereby is, granted.

IT IS FURTHER ORDERED that the Clerk of this Court be, and hereby is, directed to enter a final judgment dismissing Plaintiff's "air bag" claim.

DATED this 28th day of September, 1987.

UNITED STATES DISTRICT JUDGE

Traffic Safety
Administration
400 Seventh Street S.W.
Washington DC 20590

Mr. Daniel L. Thistle
Beasley, Hewson, Casey,
Colleran, Erbstein & Thistle
5th Floor
21 South 12th Street
Philadelphia, PA 19107

Re: Dawson v. Chrysler Corp.
Dear Mr. Thistle:

This responds to your letter of December 24, 1980, concerning whether the Federal motor vehicle safety standards establish design criteria and whether compliance with those standards constitutes a defense in a product liability suit.

As explained below, Federal motor vehicle safety standards allow manufacturers latitude in to develop a variety of designs to comply with the performance requirements set in the standards. In addition, compliance with a Federal motor vehicle safety standard does not constitute a defense in a product liability suit.

Section 102(2) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1391(2)) defines a motor vehicle safety standard as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provide objective criteria." Section 103(f) (15 U.S.C. 1392(f)) of the Act also requires a standard to be "reasonable,

practicable and appropriate for the particular type of motor vehicle . . . for which it is prescribed."

Each of our safety standards meets the need for motor vehicle safety by specifying requirements for the performance of a particular vehicular system or item of equipment. For example, Standard No. 214, *Side Door Strength*, cited in your letter, sets certain crush resistance requirements that a passenger car must meet in static load test. It does not require the use of a specific design. Thus, manufacturers need not use the most effective design available. They may use any design that will satisfy the performance requirements of the standard.

It also does not require that manufacturers limit their chosen design to the performance levels specified in the standard. The performance requirements are minimum, not maximum. Manufacturers are free to select designs which exceed those in the safety standards.

Although our safety standards meet the need for safety, they do not necessarily attempt to solve the full extent of a particular safety problem. The static test requirements of Standard No. 214 are a prime example. Compliance with those requirements has yielded some significant benefits. However, large numbers of persons continue to be killed or seriously injured in side impact crashes. Accordingly, the agency issued an advance notice of proposed rulemaking (44 FR 70204; December 6, 1979) to explore the possibility of replacing the existing laboratory tests with dynamic tests that simulate actual side crashes. (A copy of the notice is enclosed.)

In recognition of the foregoing factors, Congress has provided that compliance with a safety standard does not constitute a defense in a product liability suit. Section 108(c) (15 U.S.C. 1397(c)) of the Act provides that compliance with a motor vehicle safety standard "does not exempt any person for liability under common law." The House Report (H.R. Rep. No. 1776, 89th Cong. 2d Sess. (1966)) on section 108(c) states that, "It is

intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability."

Likewise, compliance with a Federal motor vehicle safety standard does not presumptively mean that the design chosen by a manufacturer is safe. Congress gave the agency the authority to order manufacturers to notify owners about safety-related defects in their vehicles and to remedy those defects (15 U.S.C. 1411-1420). On occasion, the agency has required manufacturers to conduct defect notification and remedy campaigns even though the vehicle complied with applicable Federal motor vehicle safety standards. For example, the 1968 and 1969 Ford Mustangs and Cougars complied with the performance requirements set in Standard No. 207, *Seating Systems*. Because the seat back brackets in those seats experienced numerous failures in actual performance that affected the ability of the driver to control the vehicle, the agency ordered the recall of those vehicles.

Finally, the agency's interpretation letter of November 3, 1978, cited in your letter, does not interpret section 108(c) of the Act. The letter, a copy of which is enclosed, involved the issue of whether a California motor vehicle regulation was preempted under section 103(d) (15 U.S.C. 1392(d)) of the Act by a Federal motor vehicle safety standard. Secton 103(d) is limited to the effect of Federal standards on State regulations covering the same aspects of performance. Section 108(c) of the Act governs the effect of Federal standards on product liability suits.

Sincerely,

Original Signed By
Frank Berndt
Chief Counsel

Enclosures